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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-507

WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, REED ENTERPRISES, INC., DAVID L. THOMAS, and LIBRARY SERVICE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for Petitioners Hamling, Reed Enterprises, Inc. and Library Service, Inc.

Opinion Below.

The opinion of the Court of Appeals is reported at 481 F.2d 307 and appears in Appendix A to the Petition for Writ of Certiorari, pages 1 through 38.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 7, 1973. A due and timely petition for rehearing and suggestion for rehearing *en banc* was filed on or about June 18, 1973. On August 22, 1973, an order was entered stating that

the aforesaid petition "will be submitted to the full court".[1] A copy of the said order appears in Appendix B to the Petition for Writ of Certiorari, pages 39 and 40. On August 23, 1973, an order was entered denying the petition for rehearing and rejecting the suggestion for a rehearing *en banc*. A copy of the said order appears as Appendix C to the Petition for Writ of Certiorari, page 41. On August 28, 1973, the Honorable Stanley N. Barnes, a Judge of the United States Court of Appeals for the Ninth Circuit, made an order staying issuance of the mandate of the court pending the filing, consideration and disposition by this Court of a Petition for a Writ of Certiorari on or before September 24, 1973. A copy of the said order appears as Appendix D to the Petition for Writ of Certiorari, page 42. The Petition was filed on September 8, 1973 and granted on January 14, 1974. Jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Questions Presented.

1. Whether the provisions of Title 18 United States Code §1461, on their face and as construed and applied to petitioners' pre-June 21, 1973 conduct, violated the guarantees of the First and Fifth Amendments to the United States Constitution, because they failed to provide "fair notice" or "concrete guidelines" as to what sexual expression was prohibited by the provisions of the statute.

2. Whether, in light of this Court's June 21, 1973 rulings, the Indictment herein is fatally defective because it failed to inform petitioners of the nature and

[1]An order was initially entered on July 9, 1973, denying the petition for rehearing, but was thereafter, by order of the court, withdrawn on July 19, 1973.

cause of the accusations against them in violation of the provisions of the Sixth Amendment.

3. Whether the provisions of Title 18 United States Code §1461, on their face and as construed and applied to authorize the jury to measure the prurient appeal of the brochure by its impact on undefined sexually deviant groups rather than solely by its impact on the average person in the Nation as a whole, violated the free speech and press provisions of the First Amendment and the due process provisions of the Fifth Amendment.

4. Whether the provisions of Title 18 United States Code §1461, on their face and as construed and applied, violate the free speech and press provisions of the First Amendment and the due process provisions of the Fifth Amendment, because the trial court instructed the jury that it could find the brochure obscene even if the brochure did not meet the *Roth-Memoirs* test if the jury found "pandering", notwithstanding the fact that neither the statute nor the Indictment fairly advised petitioners that they were charged with pandering.

5. Whether the brochure at issue is protected by the free speech and press provisions of the First Amendment.

6. Whether petitioners were denied a fair trial, and due process of law, when the trial court, in open defiance of Rule 30, Federal Rules of Criminal Procedure, denied petitioners the opportunity to make objections to the court's jury charge outside the presence of the jury.

7. Whether petitioners were denied a fair trial by an impartial and representative jury, in violation of the guarantees of the Fifth and Sixth Amendments.

8. Whether the provisions of Title 18 United States Code §§2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where the Indictment was returned by a Grand Jury which was presented with no evidence of the essential elements of the offense charged which was misdirected by the prosecutor as to the applicable law, and where the prosecutor appealed to the biases and prejudices of the members of the Grand Jury, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

9. Whether the provisions of Title 18 United States Code §§2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, under a standard for judging scienter solely by alleged proof of knowledge of the "contents" of the brochure involved, the courts below having rejected any requirement of proof of knowledge of the alleged obscenity of the brochure or proof of reckless disregard of the alleged obscenity, or intent to commit a public wrong, and specifically rejecting a defense of honest ignorance of the alleged obscenity of the brochure, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute an infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

10. Whether the provisions of Title 18 United States Code §§2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, without any evidence to establish that each of the petitioners even possessed knowledge of the alleged contents of the brochure, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

11. Whether the provisions of Title 18 United States Code §§2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, without proof of the essential elements of obscenity and scienter, or proof of corrupt agreement or aiding and abetting or causation by petitioners, under both the conspiracy and substantive counts of the Indictment, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

12. Whether the provisions of Title 18 United States Code §§2, 371 and 1461, on their face and as construed and applied to authorize the judgments of conviction herein, where the trial court excluded an entire category of constitutionally relevant evidence offered by petitioners on the issues of nonobscenity of

the brochure and lack of guilty knowledge, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioners of their liberty and property without due process of law, discriminatorily deny the equal protection of the laws, deny the right to a fair trial and constitute the infliction of cruel and unusual punishment in violation of the First, Fifth, Sixth and Eighth Amendments.

This Brief deals with Questions 1 through 8, inclusive. The companion Brief filed on behalf of petitioners Earl Kemp, Shirley R. Wright and David L. Thomas deal with Questions 9 through 12, inclusive. Petitioners herein incorporate by reference as though fully set forth herein the argument made in the said companion Brief.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fifth, Sixth and Eighth Amendments; Title 18 United States Code §§2, 371 and 1461; and Rule 30 of the Federal Rules of Criminal Procedure appear in Appendix E to the Petition for Writ of Certiorari, pages 43 through 46.

Statement.

1. The Indictment was returned on March 5, 1971. The brochure at issue was mailed on specified dates in December of 1970 and January 1971. The judgments of convictions were entered in the District Court on February 7, 1972. The judgments of conviction were affirmed on June 7, 1973. The Indictment, the trial thereunder, the judgments of conviction and the affirmance of said judgments rest upon standards which existed prior to the rulings of this Court on June 21,

1973 in *Miller v. California*, 413 U.S. 15, and the related cases.

2. The Indictment [J.A. 14-31][2] charged the individual and corporate petitioners with violations of 18 U.S.C. §§2 and 1461, and a conspiracy to violate the said statutes, contrary to the provisions of 18 U.S.C. §371. Although the Indictment was in 21 counts, the works involved were two in number. One item was a book entitled *The Illustrated Presidential Report of the Commission on Obscenity and Pornography* (hereinafter referred to as "The Illustrated Report"). The other item was a brochure advertising the book. Essentially, the Indictment charged that the book was "obscene, lewd, lascivious, indecent, filthy and vile"; that the brochure similarly violated the federal obscenity statute; and, in addition, that the brochure gave information where, how, from whom and by what means *The Illustrated Report* might be obtained, in violation of §1461. The jury was unable to reach agreement on the charge made against *The Illustrated Report* or on the charge made against the brochure that it gave information how the book might be obtained. The petitioners were convicted therefore solely of mailing the brochure and conspiring to mail the brochure.[3]

3. Petitioners filed a series of pre-trial motions, including a motion to dismiss the Indictment, upon the

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[2]The reference "J.A." is to the Joint Appendix. The reference "C.T." is to the Clerk's Transcript on appeal to the Court of Appeals for the Ninth Circuit. The reference "R.T." is to the Reporter's Transcript of the trial.

[3]The publisher of *The Illustrated Report* was Greenleaf Classics, Inc., named as a defendant in the Indictment. The jury returned a verdict of not guilty as to this defendant with respect to the conspiracy charge, as well as the mailing of the brochure.

grounds, *inter alia*, that the Indictment failed to allege the essential elements of obscenity and therefore failed to state facts sufficient to constitute an offense against the United States, and that §1461, on its face and as construed and applied, violated the free speech and press, due process and equal protection provisions of the First, Fifth and Sixth Amendments, and the cruel and unusual punishment provisions of the Eighth Amendment [J.A. 32-34]. Petitioners argued that the statutory terminology, repeated in the Indictment, was, standing by itself, essentially meaningless, and that this Court had not yet given the statutory language "a settled meaning".

Petitioners also filed a motion for a bill of particulars which requested the Government to state "the essential elements" of the term "obscene" [J.A. 35-38]. The Government responded that for purposes of argument it would assume "that the three-fold test, as enumerated in the plurality opinion in *Memoirs v. Massachusetts*, 383 U.S.413, 418, is the appropriate standard" [J.A. 44-45].

In connection with a separate motion to dismiss the Indictment because of matters occurring before the Grand Jury, a pre-trial evidentiary hearing elicited testimony from the prosecutor who presented the case to the Grand Jury [R.T. 13-14] that he had advised the Grand Jury to be "guided solely by their instinctive feeling" [R.T. 19-20]; that they were to be guided by the standards of "moral judgment" which they had "assimilated through the totality of their experiences" [R.T. 20-21]; that they were "the sole judges of the contemporary community standards of this country" and that the term "contemporary community stand-

ards" refers to "the average conscience of the time" [R.T. 33]. Although the prosecutor was not sworn before the Grand Jury, he detailed to that body the factual situation in *Ginzburg v. United States*, 383 U.S.463, placing particular emphasis on a publication involved in that case; discussed the extent of sales of the book involved in the *Ginzburg* case and the advertisement for the said book; "drew a parallel" between the *Ginzburg* case and the case at bar; and advised the Grand Jury that "we felt that the facts in this case were similar enough to those in the *Ginzburg* case to present [the matter to the Grand Jury] to see if they felt there was probable cause to believe that a Ginzburg-type situation was present [in the case at bar]" [R.T. 28-29].

Petitioners moved to strike the jury venire and challenged the jury panel upon the ground, among others, of a systematic exclusion of an identifiable group within the community, *i.e.*, persons 25 years of age and under [J.A. 65-70]. The hearing before the trial court on this issue established that the master wheel from which the trial jury was drawn was filled in 1968 with the names of then registered voters. In 1971, therefore, the venire from which the trial panel was drawn contained no persons under 24 years of age and very few under 25 years of age [R.T. 73-74]. Petitioners offered evidence establishing that young persons were a cognizable group and more tolerant than older persons in matters relating to the depiction of explicit sexual materials [R.T. 85-86]. The Clerk of the court testified that the master wheel was to be refilled in about one month [R.T. 94-98]. Although the trial court conceded that petitioners would have benefited by having jurors on the panel in the age group 18-25

[R.T. 91-92] and that the evidence presented indicated that "it is time to change the jury master wheel" [R.T. 93], it nevertheless denied the motion to strike the jury panel [J.A. 5]. Thereupon, petitioners moved for a short continuance, of approximately one month, so that their jury would be drawn from a master wheel that included persons 21 years of age or over [R.T. 95-98]. This motion was denied [J.A. 5].

The entire *voir dire* examination was conducted by the trial court [R.T. 99, 137-164, 166-314]. The court declined to ask many of the questions proposed by petitioners. Among the questions petitioners unsuccessfully urged the court to ask the prospective jurors were the frequency with which they attended a place of worship and whether they considered themselves deeply religious; whether they recently had heard a sermon at their place of worship dealing with the subject of obscenity; whether they had ever been a member of or made contributions to the Citizens for Decent Literature, or any other organization having as one of its purposes the control by law of obscene material; whether they had recently seen a film or read a book dealing candidly with sexual matters; and whether they would refrain from viewing a film solely because it was condemned by a publication known as "The Catholic Newsletter" [J.A. 78-81].

4. On the issue of "obscenity", the Government called only two witnesses. Dr. Melvin Anchell, a Medical Doctor and a self-proclaimed psychiatrist without Board certification [R.T. 1606-1609, 1629-1631], testified that in his opinion the dominant theme of the brochure was "pruriency" [J.A. 147]. His total testimony concerning the brochure consisted of that single

word. The trial court recognized that Dr. Anchell was "rigid" [R.T. 2174].

The Government's other expert witness was a Mr. Frank Getlein, a newspaper man. He testified that in his opinion the brochure was a miniature of *The Illustrated Report* and was patently offensive and was utterly without redeeming social value [J.A. 148-151].

Petitioners called four expert witnesses, each of whom testified that the brochure had redeeming social value: Dr. Otto N. Larsen, one of the Commissioners of the Commission on Obscenity and Pornography; Dr. W. Cody Wilson, the Executive Director and Director of Research of the Commission; Dr. Jack Haberstroh, Assistant Professor of Journalism at the San Diego State College; and Professor Dwight V. Swain, a Professor of Journalism and Literature.

Commissioner Larsen and Dr. Wilson also testified that the brochure did not appeal to "prurient interest" and that it did not go beyond "customary limits of candor" in sexual matters and was not patently offensive [J.A. 193-194, 167-169, 170-172, 175, 184-185].

The Government did not put on any rebuttal evidence.

It should be observed that the brochure advertised the book, *The Illustrated Report*, and that a considerable portion of the evidence offered by both the Government and petitioners revolved about the question of the alleged obscenity or nonobscenity of the book, an issue upon which the jury could not agree. It was stipulated by the Government during the trial, that every picture in *The Illustrated Report* was related to the text of *The Commission Report;* that pictures simi-

lar to those appearing in the book were used in various research activities that the Commission undertook; that the photographs and other illustrations in *The Illustrated Report* depicted explicit sexual material within the definition of that term as it was used by the Commission in its *Report;* and that every picture in *The Illustrated Report* was similar to some of the material used by some of the researchers in *The Commission Report* [J.A. 163-165]. Each of the depictions contained in the brochure advertising *The Illustrated Report* appears in the said book, and the statement in the brochure with respect to the probability that the scenes depicted in the brochure were part of the photographs used in one of the studies for the Commission appears to be accurate, in the light of the stipulations by the Government during the trial.

5. Despite the absence of any charge in the Indictment or any proof in the record of alleged "pandering", the trial court nevertheless instructed the jury that even if the brochure did not meet the tripartite *Memoirs* test, still the jury was free to find the brochure obscene if the jury found that the brochure was "produced and sold as stock in trade of the business of pandering" [J.A. 245]. The "pandering" instructions by the trial court to the jury were extensive [J.A. 242-246]. It is important to note that after the jury had begun its deliberations, it requested the court to reread its instructions on obscenity and "pandering" [R.T. 4989-4990].

The trial court instructed the jury: "Prurient interest is a shameful or morbid interest in sex or nudity and you must measure this appeal by the average or ordinary adult or by a clearly defined deviant group as will be explained elsewhere" [J.A. 238-239]. The

trial court then addressed itself to the two aforesaid alternatives. The court first instructed the jury that the brochure could be measured by its appeal to the average adult and not by young persons or persons highly susceptible thereto [J.A. 239]. The court also instructed the jury that if some of the material appealed to the prurient interest of the average person and some of the material appealed to the prurient interest of a deviant sexual group, still the jury would not be precluded from finding that the dominant theme of the material, taken as a whole, appealed to the prurient interest [J.A. 240-241]. The trial court, on the other hand, instructed the jury that "in addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms of sexual interest of the intended or probable recipient group" [J.A. 239].

There was never any charge in the Indictment nor any proof in the record that the brochure herein was designed for or primarily disseminated to a clearly defined sexually deviant group rather than the public at large.

To all of the aforesaid denials of petitioners' requested instructions, and to the trial court's instructions, there were appropriate objections made by the petitioners.

6. Rule 30 of the Federal Rules of Criminal Procedure provides that a party may not assign as error any portion of the charge to the jury unless he objects before the jury retires to consider its verdict. The Rule specifically provides that opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

After the court instructed the jury, counsel for petitioners stated a desire to object to portions of the charge and specifically urged the trial court to ask the jury to go into the jury room while petitioners' objections were presented. The trial court denied the request [J.A. 257]. Thereafter, counsel was compelled to make objections to the trial court's instructions in the presence of the jury. The objections were wide-ranging and covered a multitude of areas in which counsel for petitioners claimed erroneous instructions had been given. All of these objections counsel was compelled to make in the presence of the jury [J.A. 258-265].

7. There were appropriate motions made by petitioners for judgments of acquittal at the end of the Government's case and at the end of the entire case, and there were also post-trial motions in arrest of judgment, for a new trial, and for acquittal. All of the said motions were denied.

As heretofore stated, the jury could not agree on a verdict with respect to *The Illustrated Report*. The jury reached a verdict of guilty only with respect to the alleged obscenity of the brochure, both on the conspiracy and substantive counts. Judgments of conviction were entered on February 7, 1972. The petitioner Hamling was sentenced to imprisonment for four years and fined $32,000; petitioner Kemp was sentenced to imprisonment for three years and one day; petitioner Wright was sentenced to imprisonment for one and one-half years, execution of the sentence suspended, and petitioner placed on probation for a period of five years; and petitioner Thomas sentenced to imprisonment for one and one-half years, execution of the sentence suspended, and petitioner placed on pro-

bation for a period of five years. The conditions of probation were extremely onerous. A fine of $43,000 was imposed on petitioner Reed Enterprises, Inc., and a fine of $12,000 was imposed on petitioner Library Service, Inc. Bail for petitioner Hamling was fixed in the sum of $15,000; for petitioner Kemp, in the sum of $10,000; and for each of the petitioners Wright and Thomas, in the sum of $1,000. The said bail was furnished and petitioners were freed on bail pending appeal [J.A. 11-13].

8. As appears from the opinion of the Court of Appeals, the judgments of conviction were affirmed. The court held that 18 U.S.C. §1461 was not unconstitutionally vague and that the use of the statutory language in the Indictment did not fail to advise petitioners of the charge which they were called upon to defend. The court held that the Indictment herein, framed in the language of the statute, was not indefinite or vague.

Petitioners herein have omitted from the Statement of the case that portion related to the issues briefed in the companion brief filed on behalf of petitioners Earl Kemp, Shirley R. Wright and David L. Thomas, and the petitioners herein adopt by reference the Statement of the case, together with the argument and the points of fact and law presented in the brief filed by said petitioners Kemp, Wright and Thomas.

ARGUMENT.

I.

The Provisions of Title 18 United States Code §1461, on Their Face and as Construed and Applied to Petitioners' Pre-June 21, 1973 Conduct, Violated the Guarantees of the First and Fifth Amendments to the United States Constitution, Because They Failed to Provide "Fair Notice" or "Concrete Guidelines" as to What Sexual Expression Was Prohibited by the Provisions of the Statute.

In light of *Miller v. California*, 413 U.S.15, and the related cases, the federal criminal statute involved herein, affecting First Amendment rights, was, prior to June 21, 1973, unconstitutionally vague for the following five reasons:

1. the statute concededly does not contain a description of the specific sexual conduct *Miller* held was constitutionally mandated, and prior to June 21, 1973 the statute had not received an authoritative construction reading the necessary terminology into the statute;

2. prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications offend national standards, which nationwide standards this Court found were unascertainable, unprovable and non-existent;

3. prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications appeal to the prurient interest of the average person in the Nation as a whole, which test this Court labeled "unrealistic";

4. prior to June 21, 1973, the statute had been authoritatively construed as requiring proof

that charged publications were "utterly without redeeming social value", a test this Court found "unworkable" and "ambiguous";

5. prior to June 21, 1973, the statute was so "vague, ambiguous and essentially meaningless" that this Court was compelled to act as an unreviewable board of censorship "subjectively judging each piece of material" charged with being obscene under §1461.

Before examining with particularity the vagueness of the statute, petitioners note that this criminal statute must be scrutinized in light of the strict standards of permissible statutory vagueness applied to a statute having a potentially inhibiting effect on speech and the particularly stringent standards applicable to a *federal* obscenity statute.

In *Miller*, Chief Justice Burger made it clear that the federal and state standards were quite different by citing Justice Harlan's opinions wherein he repeatedly argued for tight federal obscenity laws and looser state laws. (413 U.S. at 29).

The distinction was initially articulated by Justice Harlan dissenting in *Roth* and concurring in *Alberts*, 354 U.S. at 503-508.

> ". . . [T]he interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric."

Justice Harlan went on to say that not only is the federal interest in protecting the Nation against pornography attenuated, "but the dangers of federal censorship in this field are far greater than anything the States may do." Justice Harlan asserted that he would judge a federal obscenity case against the background of "the attenuated federal interest in this field" and in view of the "very real danger of a deadening uniformity which can result from nationwide federal censorship." (*Id.*)

In *Jacobellis v. Ohio*, 378 U.S.184, Justice Harlan, dissenting, expressed the view that the States are constitutionally permitted greater latitude in determining what is bannable on the score of obscenity than is so with the Federal Government. "The more I see of these obscenity cases the more convinced I become that in permitting the States wide, but not federally unrestricted, scope in this field, while holding the Federal Government with a tight rein, lies the best promise for achieving a sensible accommodation between the public interest sought to be served by obscenity laws . . . and protection of genuine rights of free expression." (378 U.S. at 203-204).

In *Miller*, Chief Justice Burger cited with approval the dissenting opinion in *Hoyt v. Minnesota*, 399 U.S. 524, 525, where Justice Blackmun stated that he was not persuaded that the First and Fourteenth Amendments necessarily prescribe a national and uniform measure of what *each of our several States* constitutionally may do to regulate obscene products within its borders. "At this still, for me, unsettled stage in the development of *state law of obscenity* in the federal constitutional context I find myself generally in ac-

cord with the views expressed by Mr. Justice Harlan . . . and with those enunciated by the Chief Justice in *Cain v. Kentucky*, 397 U.S.319 . . . and in *Walker v. Ohio*, 398 U.S.434." (Emphasis added).

This Court has always held that "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith v. California*, 361 U.S.147, 151. This rule was recognized in *Miller*, where the Court cited *Interstate Circuit, Inc. v. Dallas*, 390 U.S.676, 682-685, for the proposition that when First Amendment rights are at stake, "precision of regulation must be the touchstone". Chief Justice Burger recognized "the inherent dangers of undertaking to regulate any form of expression", saying that state statutes designed to regulate obscene materials "must be carefully limited. See, *Interstate Circuit, Inc. v. Dallas, supra*, 390 U.S. 682, 685. . . ." (413 U.S. at 23-24). In *Interstate Circuit*, the Court discussed with approval *Winters v. New York*, 333 U.S.507, where the Court struck down as vague and indefinite a standard pursuant to which publications were condemned if they contained "criminal news or stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting violent and depraved crimes". In *Interstate Circuit*, the Court also cited with approval *Burstyn v. Wilson*, 343 U.S.495; *Gelling v. Texas*, 343 U.S.960; *Superior Films, Inc. v. Dept. of Education*, 346 U.S.587; *Commercial Pictures Corp. v. Regents*, 346 U.S.587; *Holmby Productions, Inc. v. Vaughn*, 350 U.S.870; and *Kingsley Int'l. Pic. Corp. v. Regents*, 360 U.S.684. These cases had con-

demned as unconstitutionally vague the following standards:

> "Sacriligious", which was found to have such an all-inclusive definition as to result in 'substantially unbridled censorship".
>
> "Of such character as to be prejudicial to the best interest of the people of the city".
>
> "Morally educational, or amusing and harmless".
>
> "Immoral" and "tend to corrupt morals".
>
> "Approve such films . . . [as] are moral and proper; . . . disapprove such as are cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals".
>
> "Unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacriligious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime. . . ."

In *Interstate Circuit*, the Court approved Justice Clark's concurring remarks in *Kingsley Int'l. Pic. Corp. v. Regents*, 360 U.S. at 701, where he stated: "The only limits on the censor's discretion is his understanding of what is included within the term 'desirable, acceptable or proper.' This is nothing less than a roving commission in which individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law. . . ." In *Miller*, Chief Justice Burger observed that the obscenity problem had evoked a variety of views among the members of the Court unmatched in any other course of constitutional adjudication, and added: "This is not remarkable, for in the area of freedom of speech and press

the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression. This is an area in which there are few eternal verities." (413 U.S. at 22-23). In *NAACP v. Button*, 371 U.S.415, the Court said that the objectionable quality of vagueness and overbreadth is the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Cf. *Smith v. California*, 361 U.S at 151-154; *Speiser v. Randall*, 357 U.S.513, 526. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." (371 U.S. at 432-433). See, *Marcus v. Search Warrants*, 367 U.S.717, 733; *Bantam Books, Inc. v. Sullivan*, 372 U.S.58, 65; *Stanley v. Georgia*, 399 U.S.557, 566.

The "vice of vagueness" is especially pernicious where, as here, legislative power over an area involving speech, press, petition and assembly is involved. "For a statute broad enough to support infringement of speech, writings, thoughts and public assemblies, against the unequivocal command of the First Amendment necessarily leaves all persons to guess just what the law really means to cover, and fear of a wrong guess inevitably leads people to forego the very rights the Constitution sought to protect above all others. . . ." *Barenblatt v. United States*, 360 U.S. 109, 137-138 (Black, J., dissenting).

With these principles in mind, petitioners turn to the record in the case at bar.

From first to last, petitioners contended that the provisions of §1461 failed to provide persons of ordinary intelligence a reasonable opportunity to know what the statute prohibited so that they may act accordingly. In their motion to dismiss the Indictment, petitioners contended that §1461, on its face and as construed and applied, was vague, uncertain, ambiguous, overbroad and violative of the free speech and press, due process and equal protection provisions of the First, Fifth and Sixth Amendments and the cruel and unusual punishment provisions of the Eighth Amendment [J.A. 32-35].

Petitioners requested an evidentiary hearing in connection with their motion to dismiss the Indictment, stating that they intended to prove by expert testimony and other oral and documentary evidence that it is impossible for persons of ordinary intelligence to know with reasonable certainty what conduct on their part brings them within the ambit of 18 U.S.C. §1861 [C.T. 134]. They also asseeted that they would show that there is "no such thing as contemporary community standards in the Nation as a whole with regard to matters of sex, nudity and excretion", and that there is "no average person in the Nation as a whole against which to determine whether particular material appeals to the prurient interest of the average person" [C.T. 135]. Petitioners offered to show "by extrinsic evidence that, in fact, the statute is unconstitutionally vague, because persons of ordinary intelligence, and indeed persons of extraordinary intelligence, are unable to determine in advance what is obscene and violative of the Section." [C.T. 137].

In connection with the said motion, petitioners submitted an affidavit of Dr. Jay Ziskin, a clinical psychol-

ogist, a professor and a licensed attorney [J.A. 49]. After setting forth his qualifications, Dr. Ziskin gave his opinion that the tests for judging obscenity were vague, incomprehensible and incapable of objective measurement. He stated that "with regard to the type of sexual stimuli responded to and the manner or nature of the response, there appears to be such a wide variety of responses in the American population as to preclude any meaningful application of the term 'average'." He also asserted that whether material goes substantially beyond contemporary community standards will depend on the geographic character and composition of the "community", and who the person is who purports to determine what "community standards" are. The limits of candor among young people appear to be considerably different from those existing among older people. By way of conclusion, Dr. Ziskin stated that the definition of obscenity "is not one which can be applied by ordinary individuals, including those most concerned, such as booksellers, law enforcement officials and jurors. There is, in fact, no body of knowledge by which experts such as behavior scientists and mental health professionals can make a determination that a given work appeals predominantly to prurient interest of the average person. There is a body of research, mostly contained in the *Report of the Commission on Obscenity and Pornography*, which strongly suggests that the definition is one which cannot be met [J.A. 49-59]. The trial court denied petitioners an evidentiary hearing to support their allegation that §1461 was unconstitutionally vague. See, *Borden's Farm Products Co., Inc. v. Baldwin*, 293 U.S.194, 209-213; *Chastleton Corp. v. Sinclair*, 264 U.S.543, 547-549; *Weaver v. Palmer Bros. Co.*, 270 U.S.402, 410;

Nashville C.&S.L.Ry. v. Walters, 294 U.S.405, 414-416; *Polk Co. v. Glover*, 305 U.S.5, 9-10.

Following conviction herein, petitioners moved in arrest of judgment, again alleging that 18 U.S.C. §1461, on its face and as construed and applied, violated the free speech, equal protection, due process and cruel and unusual punishment provisions, in violation of the First, Fifth, Sixth and Eighth Amendments [J.A. 11]. This motion was denied [J.A. 11].

In response to petitioners' attack on the vagueness of §1461, the court below said: "The language of Section 1461 does not offend constitutional safeguards . . ., or fail to give men in acting adequate notice of what is prohibited. Roth v. United States, 354 U.S. 476, at 491-492." (481 F.2d at 312). Two weeks later, this Court said, in *United States v. 12 200-Ft. Reels*, 413 U.S.123, 130, n.7: "If and when . . . a 'serious doubt' is raised as to the vagueness of the words 'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,' or 'immoral' as used to describe regulated material . . . we are *prepared* to construe such terms as limiting regulated material to" the kind mentioned in *Miller v. California*, 413 U.S.15, 24.[4] (Emphasis added).

In *Miller*, the Court recognized the need to "formulate standards more concrete than those in the past" (413 U.S. at 20). The need was manifest because the Court had formulated a variety of views on obscen-

[4]In *O'Shea v. Littleton*, ... U.S. ...., 94 S.Ct.669, Justice Blackmun stated that this Court is powerless to render an advisory opinion, citing *Hayburn's Case*, 2 Dall. 409 (1792); *United States v. Evans*, 213 U.S.297, 301 (1909); *Muskrat v. United States*, 219 U.S.346, 360-361 (1911); *Stearns v. Wood*, 236 U.S.75 (1915); *Coffmen v. Breeze Corps*, 323 U.S.316 (1945); *United Public Workers v. Mitchell*, 330 U.S.75 (1946); *Paschall v. Christie-Stewart, Inc.*, 414 U.S. ...., 94 S.Ct.312.

ity "unmatched in any other course of constitutional adjudication".

Following judgment herein, a different panel of the Ninth Circuit, after examining this Court's opinions of June 21, 1973, concluded that §1462 was, prior to June 21, 1973, "vague, ambiguous and essentially meaningless". *United States v. Henson*, ... F.2d ..... (9 Cir., No. 73-2063, Oct. 5, 1973).

A. At the time petitioners allegedly mailed the brochure in question, §1461 failed to provide "fair notice" or "concrete guidelines" as to what sexual expression was prohibited by the said statute.

1. Prior to June 21, 1973, §1461 Was Unconstitutionally Vague, Because It Failed to Contain a Description of the Sexual Conduct Miller Held Was Constitutionally Mandated and the Statute Had Not Received a Prior Authoritative Construction Reading the Necessary Terminology Into the Statute.

In *Miller*, 413 U.S. at 23-24, the Court said that "statutes designed to regulate obscene materials must be carefully limited. . . . As a result we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed." Subsequently, the Court said that under "the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice." (413 U.S. at 27). "Prerequisite" is defined as something

that is "required beforehand; necessary as a preliminary condition." Webster's Third New International Dictionary, Unabridged (G.&C. Merriam Co. 1967).

Justice Brennan, dissenting in *Paris*, stated that when an obscenity statute, such as the one at bar, failed to contain the required description of prohibited conduct, the statute could not stand.

> "While the Court's modification of the *Memoirs* test is small, it should still prove sufficient to invalidate virtually every state law relating to the suppression of obscenity. For under the Court's restatements, a statute must specifically enumerate certain forms of sexual conduct, the depiction of which is to be prohibited. It seems highly doubtful to me that state courts will be able to construe state statutes so as to incorporate a carefully itemized list of various forms of sexual conduct, and thus to bring them into conformity with the Court's requirements. Cf. *Blount v. Rizzi*, 400 U.S. 410, 419 (1971). The statutes of at least one State should, however, escape the wholesale invalidation. Oregon has recently revised its statute to prohibit only the distribution of obscene materials to juveniles or unconsenting adults. The enactment of this principle is, of course, a choice constitutionally open to every State even under the Court's decision." (413 U.S. at 95, n.13.)

The Chief Justice did not agree with Justice Brennan's views. "We do not hold . . . that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed *heretofore* or hereafter *may* well be adequate." (413 U.S. at 24, n.6.) (Emphasis added.) In discussing the kind of

statute he had in mind, the Chief Justice pointed to Oregon and Hawaii statutes "as examples of state laws directed at depiction of defined physical conduct, as opposed to expression. (*Id.*)

In its opinion affirming the judgment herein, the court below had no occasion to consider the impact of *Miller*, since its opinion was filed two weeks before *Miller* was decided.[5] Other courts have suggested, however, that the statute's deficiency could be saved by an authoritative retroactive construction. In *United States v. Thevis*, 484 F.2d 1149, 1155 (5 Cir. 1973), the Court stated: "On its face, this statutory terminology ['obscene, lewd, lascivious or filthy'] does not contain the specifics required by *Miller*. . . . *Miller* requires that elements of the definition be a part of the statute." Nevertheless, that court held that *Miller* could be read into the federal obscenity statute retroactively, saying: ". . . [I]n *12 200-Ft. Reels, supra*, at fn. 7, the Court states that it is 'prepared to construe such [federal statutory] terms as limiting regulated material to patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller*. . . .' We believe that this answers the question and that the definition of *Miller* is a gloss properly added to [§1461] . . ." (484 F.2d at 1155). Such an approach, petitioners respectfully submit, is plainly erroneous.

When this Court stated that it was *prepared* to construe the vague terms "obscene, lewd, lascivious, filthy"

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[5]The case was argued on November 1, 1972. The opinion was filed on June 7, 1973. A member of the panel, Judge Jertberg, died on June 8, 1973, without having affixed his signature to the opinion. The Los Angeles Times (June 9, 1973) reported that Judge Jertberg had been "hospitalized with cancer" a few months before his death. See, 28 U.S.C. §46(b).

in accordance with *Miller*, the Court made clear that prior to June 21, 1973, there had been no such authoritative construction. In *Louisiana v. Shreveport News Agency, Inc.*, 287 So.2d 464 (Supreme Court of Louisiana, 1973), the court refused to read *Miller* into the Louisiana obscenity statute retroactively. The Louisiana obscenity statute, like §1461, used the general terms "obscene, lewd, lascivious". etc. In concluding that the Louisiana statute was unconstitutional because it did not contain a description of the specific sexual conduct an obscenity statute must contain if it is to meet constitutional requirements, Justice Barham, speaking for the court, said:

> ". . . [I]t must be obvious even to laymen and surely to this Court, that [the Louisiana obscenity statute] does not meet the guidelines and standards set forth by the United States Supreme Court in Miller v. California.
>
> "We are urged by the State, however, to take the two examples, which the Miller majority opinion suggests state legislatures might define for regulation of certain obscene materials, and to make them the obscenity statute for Louisiana. . . .
>
> "In United States v. 12 200 Ft. Reels of Super 8 mm. Film . . . the Chief Justice . . . stated in Footnote 7, in pure obiter dictum, that the Supreme Court was prepared to construe 'obscene', 'lewd', 'lascivious', 'filthy', 'indecent', or 'immoral', for the purpose of reviewing the constitutionality of the federal statutes . . . as being limited to 'specific hardcore' sexual conduct given as exam-

ples in Miller v. California. We are bound by the holdings of the United States Supreme Court. We are not bound by the passing remarks of the authors of the opinions from that Court. We are not of the opinion that we are endowed with the constitutional authority to re-draft Louisiana's obscenity statute. . . ." (287 So.2d at 468-469).

Even if the language in *12 Reels of Film* is more than pure *obiter dictum*, it certainly did not purport to have any retroactive effect. This Court has consistently held that the Judiciary is barred by the Due Process Clause from attempting to cure a vague statute by retroactive rulings, "either of the trial court or of the appellate court". The fundamental principle which requires a criminal offense to have existed when the conduct in issue occurred applies to bar "retroactive criminal prohibitions emanating from courts as well as from legislatures". *Bouie v. Columbia*, 378 U.S.347, 353, 354. See also, *Douglas v. Buder*, 412 U.S.430. Moreover, as the Court stated in *Blount v. Rizzi*, 400 U.S.410, 419: "[I]t is for Congress, not this Court, to rewrite the statute."

2. Prior to June 21, 1973, §1461 Was Unconstitutionally Vague, Because the Statute Was Authoritatively Construed as Requiring Proof That Charged Publications Offend National Standards, Which Nationwide Standards This Court Found Were Unascertainable, Unprovable and Nonexistent.

In *Miller*, the Court held that in a *state* obscenity prosecution, *a statewide standard* was sufficient to meet constitutional requirements, and a national standard need not be applied. But in a federal obscenity case a national standard must be used, both because Congress so intended and because the Constitution

probably requires it.[6] In *Manual Enterprises, Inc. v. Day*, 370 U.S.478, Justice Harlan said: "We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency. We need not decide whether Congress could constitutionally prescribe a lesser geographical framework for judging this issue which would not have the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency." (370 U.S. at 488). In a footnote at the same page, Justice Harlan stated: "The 1958 amendments to 18 U.S.C. §1461, . . . authorizing criminal prosecution at the place of delivery evince no purpose to make the standard less than national." See also, the testimony of Justice Rehnquist when he was Assistant Attorney General, Office of Legal Counsel, Department of Justice, at *Hearings Before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, Ninety-First Con-*

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[6]The Court on June 21, 1973 was mute on the question of whether nationwide standards are still required in federal obscenity prosecutions. In *United States v. Orito*, (413 U.S.139, 143, the Court incorporated the portion of *Miller* appearing in 413 U.S. at 23, and in *United States v. 12 Reels of Film* (413 U.S. at 130, n. 7), the Court incorporated the portion of *Miller* appearing in 413 U.S. at 25. These page references relate solely to the kind of sexual conduct which might be reached under a valid obscenity statute. The discussion of local vs. national standards occurs at 413 U.S. at 30-34, where the Court said that state standards were constitutionally sufficient in a state prosecution. In *United States v. Palladino*, ... F.2d .... (1 Cir. 1974), the court held that the utilization of "local" standards in a federal obscenity prosecution raised serious constitutional questions. Accordingly, that court adhered to its long-standing ruling that national standards must be utilized in federal criminal prosecutions.

gress, on H.R.5171, H.R.11009, H.R.11031, H.R. 11032, and related measures, Serial No. 21 (pp. 37-38, 46-47), where Justice Rehnquist expressed the view that a federal obscenity statute *had* to utilize national standards.[7]

In the case at bar, the jury was repeatedly instructed that it was required to judge the brochure by national standards. The jury was instructed that it was required to find that the brochure was patently offensive "in that it goes substantially beyond contemporary national community standards relating to the description or representation of sexual matters" [J.A. 238]. "You must measure the material by contemporary or current national community standards and determine whether the material . . . exceeds . . . representations of sex and nudity which are reasonably acceptable in the national community. . . . Contemporary community standards means the standards generally held throughout this country. . . ." [J.A. 241]. The jurors were instructed that they were "the sole judges of the contemporary community standards of this country" [J.A. 241], and that if they found that the publications substantially exceed the limits of candor "acceptable in the national community, then you may find the material to be patently offensive" [J.A. 242]. "[I]n determining and applying contemporary national standards, you must consider what appears generally in magazines, books, newspapers, television, burlesque, nightclubs, novels, motion pictures, the stage and other media of communications in the nation as a whole. . . ." [J.A. 243]. Finally, the jurors were told: "You apply the standards throughout the nation, what you

[7]This testimony is set forth in some detail as Appendix G, pp. 52-54, to the Petition for a Writ of Certiorari herein.

find the standards to be throughout the nation, I think is probably a better statement." [J.A. 250].

Once it is recognized that 18 U.S.C. §1461, as applied to petitioners herein, utilized a nationwide test, it becomes clear that the statute so applied is unconstitutionally vague. In *Miller*, the Court observed that our Nation is too big and too diverse for the Court to be able to articulate "a single formulation, even assuming the prerequisite consensus exists. To structure an obscenity prosecution around evidence of national community standards "would be an exercise in futility" (413 U.S. at 30). The Court found nothing in the First Amendment that requires a jury to consider "*unascertainable* 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact." (413 U.S. at 31-32) (emphasis added). In *Miller*, the Court cited with approval Chief Justice Warren's observations in *Jacobellis v. Ohio*, 378 U.S. 184, 200, that "there is no provable 'national standard'. . . . [I]n all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one."

In *Ginzburg v. United States*, 383 U.S.463, 480, Justice Black, dissenting, stated that even if there was agreement as to the relevant community pursuant to which the obscenity of material is to be judged, "who is capable of assessing 'community standards' on such a subject? . . . So here again the guilt or innocence of a defendant charged with obscenity must depend in the final analysis upon the personal judgment and attitudes of particular individuals and the place where the trial is held." In *Winters v. New York*, 333 U.S.507, 514, this Court condemned as unconstitutionally vague

a state statute which, as construed, measured the criminality of publications by invoking the "experience of the community as to what types of books are likely to bring about the corruption of public morals or other analogous injury to the public order".

3. Prior to June 21, 1973, the Statute Was Authoritatively Construed as Requiring Proof That Charged Publications Appeal to the Prurient Interest of the Average Person in the Nation as a Whole, Which Test This Court Labeled "Unrealistic".

In *Miller*, the Court stated that under *Memoirs* a national standard of First Amendment protection enumerated by a plurality of this Court had to be used in determining what appeals to the "prurient interest". (413 U.S.15, 30). But in *Miller*, the Court rejected, for the future, the use of national standards in determining appeal to prurient interest, saying there are no "fixed uniform national standards of . . . what appeals to the 'prurient interest'. . . . When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient', it would be unrealistic to require that the answer be based on some abstract formulation."

Justice Black, dissenting in *Ginzburg v. United States*, 383 U.S.463, 478-479, said of the "prurient interest" test: "[I]t seems quite apparent to me that human beings serving . . . as judges or jurors, could not be expected to give any sort of decision on this element which would even remotely promise any kind of uniformity in the enforcement of this law. What conclusion an individual . . . would reach about whether the material appeals to 'prurient interest in sex'

would depend . . . upon the [individual's] . . . personality, habits, inclinations, attitudes and other individual characteristis. . . . In the final analysis, the submission of such an issue as this to a judge or jury amounts to practically nothing more than a request for the judge or juror to assert his own personal beliefs about whether the matter should be allowed to be legally distributed. . . ."

4. Prior to June 21, 1973 §1461 Was Unconstitutionally Vague Because It Utilized an Unworkable and Ambiguous Test—the "Utterly Without Redeeming Social Value" Test.

In connection with the "utterly without redeeming social value" test, Chief Justice Burger spoke of the "intractable obscenity problem" (*Miller*, 413 U.S. at 16) and the "variety of views among the members of the Court unmatched in any other course of constitutional adjudication" (*Id.* at 22). Quoting Justice Harlan, the Court wondered if the " 'utterly without redeeming social value' test had any meaning at all" (*Id.* at 22). The *Memoirs* test, the Court said, has been abandoned as "unworkable by its author and no member of the Court today supports the *Memoirs* formulation" (*Id.* at 23). The Court also rejected "the ambiguous concept of 'social importance'. See, *Memoirs v. Massachusetts*, 383 U.S. at 462 . . . (White, J., dissenting)." (*Id.* at 25, n.7). Justice White had suggested in *Memoirs* that the concept of "social value" was essentially meaningless, saying: "[W]hy shouldn't the fact that some people buy and read such material prove its 'social value'?"

Speaking of the "redeeming social value" test, Justice Black, dissenting in *Ginzburg*, 383 U.S. at 480, said:

"This element seems to me to be as uncertain, if not even more uncertain, than is the unknown substance of the Milky Way. If we are to have a society as contemplated by the Bill of Rights, then I find little defense for leaving the liberty of American individuals subject to the judgment of a judge or jury as to whether material that provokes thoughts or stimulates desire is 'utterly without redeeming social value. . . .' Whether a particular treatment of a particular subject is with or without social value in this evolving, dynamic society of ours is a question upon which no uniform agreement could possibly be reached among politicians, statesmen, professors, philosophers, scientists, religious groups or any other type of group. A case-by-case assessment of social values by individual judges and jurors is, I think, a dangerous technique for government to utilize in determining whether a man stays in or out of the penitentiary."

In *Stanley v. Georgia*, 394 U.S.557, 566, the Court, citing *Winters v. New York*, 333 U.S.507, stated that it is irrelevant "that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all." In *Winters v. New York*, 333 U.S. at 510, the Court rejected the suggestion that the constitutional protection for a free press applies only to the exposition of ideas. "Everyone is familiar with instances of propaganda through fiction. What is one man's amusement teaches another's doctrine.

Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." The Court, in declaring the New York statute there involved unconstitutionally vague, quoted from a New Jersey case as follows:

> ". . . That the terms 'hatred,' 'abuse,' 'hostility,' are abstract and indefinite admits of no contradiction. When do they arise? Is it to be left to a jury to conclude beyond reasonable doubt when the emotion of hatred or hostility is aroused in the mind of the listener as a result of what a speaker has said? Nothing in our criminal law can be invoked to justify so wide a discretion. The Criminal Code must be definite and informative so that there may be no doubt in the mind of the citizenry that the interdicted act or conduct is illicit." (333 U.S. at 517).

See also, *Burstyn v. Wilson*, 343 U.S.495, 501; *Cohen v. California*, 403 U.S.15, 24, 26.

5. Prior to June 21, 1973, §1461 Was so Vague, Ambiguous and Unworkable That This Court Was Required to Adopt the Redrup Approach of Deciding Each Case on an Ad Hoc Basis, Without Attempting to Offer Guidance to Those Subject to the Provisions of the Statute.

In *Miller*, Chief Justice Burger said that in view of the unworkability of the *Roth-Memoirs* test "this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. *Redrup v. New York*, 386 U.S.767. . . .

Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup* 'policy'. See *Walker v. Ohio*, 398 U.S.434, 434-435 . . . (dissenting opinions) (1970). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us." (413 U.S. at 22, n.3).

Justice Brennan, dissenting in *Paris*, 413 U.S. at 82, made the same point, saying: "In the face of this divergence of opinion the Court began the practice in 1967 in *Redrup v. New York*, 386 U.S.767, of *per curiam* reversals of convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, deemed not to be obscene." After stating that the Court had failed to formulate a satisfactory standard for separating protected from unprotected speech, Justice Brennan went on to say that out of necessity the Court "resorted to the *Redrup* approach, which resolves cases as between the parties, but offers only the most obscure guidance to legislation, adjudication by other courts, and primary conduct. By disposing of cases through summary reversal or denial of certiorari we have deliberately and effectively obscured the rationale underlying the decision. It comes as no surprise that judicial attempts to follow our lead conscientiously have often ended in hopeless confusion." (413 U.S. at 83).

Our Constitution, of course, requires fair notice so that the law-abiding can conform their conduct to the requirements of the law. But how were the petitioners, law-abiding citizens, to know what publications dealing with sex would be found obscene by five

of the Justices "subjectively judging" the publications "applying their separate tests"? If judges, attempting to follow this Court's lead conscientiously, "have often ended in hopeless confusion", was not petitioners' plight even more hopeless?

In *Grayned v. City of Rockford*, 408 U.S.104, 108-109, this Court said: "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning."

In the case at bar, petitioners, law-abiding persons, have been trapped by being convicted under a statute which no man, not even the most learned Justice can understand.

B. In three cases decided since *Miller*, the respective Circuits concluded that a conviction obtained under the *Roth-Memoirs* standards could not stand in light of *Miller v. California*. In *United States v. Friedman*, ... F.2d .... (10 Cir. Nos. 72-1143-1144, December 11, 1973), the court had before it convictions and sentences for violations of 18 U.S.C. §1465(2) after a jury trial. The court vacated the cause, saying: "It is our view that the several recent decisions of the Supreme Court requires a reconsideration of the standards applicable to cases of this nature." After citing *Miller* and the related cases, the court concluded: "These decisions, in our opinion, require a re-examination of the facts of this case together with a determination of what may be the applicable standards." In *United States v. Palladino*, ... F.2d .... (1 Cir. No. 72-1005, Jan. 5,

1974), the court also dealt with a federal obscenity conviction by a jury prior to June 21, 1973. In reversing the conviction, the court said the "defendants are caught in a period of transition, their prosecutions having taken place before the Miller decisions. They cannot fairly be subjected to penalties for violation of rules established after their actions." In *United States v. Henson*, ... F.2d .... (9 Cir., No. 73-2063, Oct. 5, 1973), the court said, after referring to this Court's decisions of June 21, 1973: "[T]he Supreme Court issued a series of opinions in which its prior definitions of obscenity were in part repudiated and in which some elements of the previously existing tests applied by the District Court . . . were generally characterized as vague, ambiguous or essentially meaningless."

In the case at bar, petitioners have been indicted and tried under a statute which, as interpreted prior to June 21, 1973, was "essentially meaningless". The judgments of conviction thereunder cannot stand.

II.

In Light of This Court's June 21, 1973 Rulings the Indictment Herein Is Fatally Defective Because It Failed to Inform Petitioners of the Nature and Cause of the Accusations Against Them in Violation of the Provisions of the Sixth Amendment.

In *United States v. Orito*, 413 U.S.139, 145, this Court vacated the judgment of the District Court and remanded the case "for reconsideration of the *sufficiency of the Indictment* in light of *Miller v. California . . .; United States v. Twelve 200 Ft. Reels* . . . and this opinion." (Emphasis added).

The necessity of examining the sufficiency of the Indictment herein flows naturally from this Court's

recognition that neither the words of the statute standing alone ("obscene, lewd, lascivious, indecent, filthy and vile") nor the gloss put on these amorphous words by *Roth-Memoirs* gave sufficient notice of the offense charged. The counts of the Indictment upon which petitioners stand convicted are solely in statutory language [See, *e.g.*, J.A. 17]. The Indictment does not contain a description of the specific sexual conduct *Miller* held the Due Process Clause requires. Nor does the Indictment limit the statutory terminology to works which, "taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value." (*Miller*, 413 U.S. at 24). Petitioners moved to dismiss the Indictment because, *inter alia*, it failed to allege the essential elements of obscenity and therefore failed to state facts sufficient to constitute an offense against the United States. The trial court denied the motion and also denied petitioners' motion in arrest of judgment filed after the convictions herein [J.A. 273]. The court below affirmed, saying that an indictment in statutory language "is not indefinite or vague and the use of statutory language in an indictment is sufficient. . . . Hopkins v. United States, 405 F.2d 770 (9 Cir. 1969)." (481 F.2d at 312). In *Hopkins*, the court stated that, at most, a charge in statutory language "could be considered ambiguous. Had counsel thought it so, he could have asked for a bill of particulars, Rule 7(f), F.R.Crim.P." (405 F.2d at 772). In the case at bar, petitioners did ask for a bill of particulars, but the Government's bill not only failed to clarify the charge but made it more confusing. More importantly, however, *Russell v. United States*,

369 U.S.749, 770, teaches that a bill of particulars cannot save an invalid indictment:

> "To allow the prosecutor, or the Court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guarantee of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicated him."

Russell holds that in an indictment upon a statute, *it is not sufficient to set forth the offense in the words* of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished (369 U.S. at 765-766). See also, *United States v. Carll*, 105 U.S.611, 612. Every member of the Court concedes that the statutory language of §1461, standing by itself, is unconstitutionally vague and broad. It follows that the mere use of the statutory terminology—which is all we have in the case at bar—fails to set forth "all the elements necessary to constitute the offense" intended to be punished by §1461. In *Russell*, the Court explored the purpose served by a grand jury indictment in the administration of federal criminal law, concluding that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation", and that "the constitutional provision that a trial may be held in a serious federal criminal case only if a grand jury had first intervened reflects centuries of antecedent development of common law" (369 U.S. at 761). In the case

at bar, the Indictment failed to inform petitioners of the charges against them. Moreover, it is clear that the Grand Jury never returned an indictment which confined the vagrant language of §1461 within constitutional limits.

Where, as here, guilt or innocence depends so crucially upon the meaning given to the words "obscene, lewd, lascivious, indecent, filthy or vile", the indictment must do more than simply repeat the vague language of that criminal statute. "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species—it must descend to particulars. . . . An indictment not framed to apprise the defendant with reasonable certainty of the nature of the accusation made against him . . . is defective, although it may follow the language of the statute." (369 U.S. at 765). The Court noted that "these basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7 (c) of the Federal Rules of Criminal Procedure. . . ." (369 U.S. at 765-766). Where, as in the case at bar, the statutory language does not encompass all the elements of the offense, an indictment which merely repeats the statutory language requires the accused "to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of his conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture. The Court has had occasion . . . to condemn such a practice in a quite different factual

setting. *Cole v. Arkansas*, 333 U.S.196, 201, 202." (369 U.S. at 766).

This principle has special application to obscenity prosecutions, where uncertainty as to the meaning of the term "obscene" has characteristically infected criminal proceedings under §1461. As the Court said in *Russell:* "Difficult and doubtful questions are inherent in the judicial process, particularly under a system of criminal law which places heavy emphasis upon the protection of the rights and the liberties of the individual. . . . [A] proliferation of doubtful issues which not only burden the judiciary, but, because of uncertainties inherent in their resolution, work a hardship upon both the prosecution and the defense in criminal cases, is hardly a desideratum. . . . [T]he repeated appearance in prosecutions under a particular criminal statute of the same critical and difficult question, which could be obviated by a simple averment in the indictment, invites inquiry into the purposes and functions which a grand jury indictment is intended to serve." (369 U.S. at 760).

In *Russell*, the Court stated that at every stage in the criminal proceeding the accused "was met with a different theory, or by no theory at all. . . . Far from informing [him] of the nature of the accusation against him, the indictment instead left the prosecution free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal" (369 U.S. at 769), and spoke of the difficulties and uncertainties which the federal trial and reviewing courts had in dealing with cases arising under the statute there involved. "Viewed in this context", the Court said the rule that an indictment must

contain more than mere statutory language "is designed not alone for the protection of the defendant, but for the benefit of the prosecution as well, by making it possible for courts called upon to pass on the validity of convictions under the statute to bring an enlightened judgment to that task." (369 U.S. at 769).

Federal trial courts and reviewing courts have had even greater difficulties and uncertainties in dealing with cases arising under §1461.

In *United States v. Vuitch*, 402 U.S.62, the trial court dismissed an indictment charging the commission of an abortion, on the ground that the statute was unconstitutionally vague. This Court reversed, concluding that the statute, properly construed, was not unconstitutionally vague. The Court stated, however, that under the statute "the burden is on the prosecution to *plead and prove* that an abortion was not 'necessary for the preservation of the mother's life or health'" (402 U.S. at 71) (Emphasis added).

In *Rabe v. Washington*, 405 U.S.313, the Court held that a state obscenity statute, construed as prohibiting the showing of a sexually oriented movie in a drive-in theatre, which movie might be exhibited to adults in an indoor theatre with impunity, was impermissibly vague for failure to give the accused fair notice that criminal liability was dependent upon the place where the film was shown. Chief Justice Burger, joined by Justice Rehnquist, concurred, saying:

> ". . . That this record shows an offensive nuisance that could properly be prohibited, I have no doubt, but the statute and *charge did not give the notice constitutionally required.*" (405 U.S. at 317) (emphasis added).

Circuit and district courts have uniformly invalidated indictments containing ambiguities less gross than those found in the case at bar. See, *United States v. Leonard*, 455 F.2d 949, 950 (9 Cir. 1972); *United States v. Fiorito*, 465 F.2d 431, 432 (7 Cir. 1972); *Nelson v. United States*, 406 F.2d 1136 (10 Cir. 1969); *United States v. Beard*, 414 F.2d 1014 (3 Cir. 1969); *United States v. Little*, 317 F.Supp.1308 (D.C. Del. 1970); *United States v. Farinas*, 299 F.Supp.852 (D.C. N.Y. 1969); *United States v. Schneiderman*, 102 F. Supp.87 (D.C. Cal. 1951).

The central fact that emerges from the June 21, 1973 decisions is that the statutory language of §1461, and the gloss put on that language by *Roth-Memoirs*, failed to give petitioners the constitutionally required notice. The Indictment, which merely repeated the defective statutory language was, therefore, fatally infirm.

III.

The Provisions of Title 18 United States Code §1461, on Their Face and as Construed and Applied to Authorize the Jury to Measure the Prurient Appeal of the Brochure by Its Impact on Undefined Sexually Deviant Groups Rather Than Solely by Its Impact on the Average Person in the Nation as a Whole, Violated the Free Speech and Press Provisions of the First Amendment and the Due Process Provisions of the Fifth Amendment.

The court below conceded that petitioners were "correct" in their contention that the brochure had to be measured solely by its impact on the average person and not by its impact on any sexually deviant groups (481 F.2d at 320-321). Indeed, no other conclusion was possible in light of the Government's bill of par-

ticulars asserting that the charge in the Indictment was that the brochure herein appealed to the prurient interest of the average person [J.A. 45-46]. The court below concluded, however, that the trial court had not committed reversible error in instructing the jury that it could measure the brochure by its appeal to the prurient interest of the average person *or* its appeal to the prurient interest of a clearly defined deviant group, and in permitting the Government expert to testify that certain pictures appealed to the prurient interest of various sexually deviant groups.

A. The Trial Court Committed Reversible Error and Rendered §1461 Unconstitutionally Vague and Broad When It Instructed the Jury That It Could Measure the Brochure by Its Appeal to the Prurient Interest of the Average Person or Its Appeal to the Prurient Interest of Undefined Sexually Deviant Groups.

The court below concluded that when the instructions "are taken as a whole" the jury was properly instructed to measure the brochure solely by its appeal to the prurient interest of the average person. (481 F.2d at 321). According to the court below, the trial court was attempting to "avoid confusion" and to make perfectly clear that the brochure was to be measured solely by its prurient interest to the average person when it instructed the jury as follows:

> ". . . the prurient interest requirement may, also, be assessed in terms of sexual interests of the intended or probable recipient group . . . (which) must be a clearly defined sexually deviant group. . . . I suppose one clearly defined would be homosexuals.
>
> "There are depicted throughout the materials under consideration, various sexual activities that

may or may not be found to be deviant, that may have prurient appeal, depending upon the particular sexual interest of the viewer, whether normal or deviant. . . .

"Consequently, if you find that some of the material appeals to the prurient interest of the average person, and some of the material appeals to the prurient interest of a deviant sexual group, that fact would not preclude your finding that the dominant theme of the material taken as a whole is, generally speaking, one of an appeal to the prurient interest, as has been previously defined in the broad sense." (See, 481 F.2d at 321-322).

A brief examination of the record in addition to a simple reading of the above quoted instruction demonstrates that the court below was in error. At the jury conference, the court's initial proposal for instructing on prurient interest read in relevant part as follows:

"Prurient interest is a shameful or morbid interest in sex or nudity and you must measure that appeal by the average or ordinary adult."

The court then advised counsel that it was going to make an addition by changing the period to a comma and adding the following:

". . . or by a clearly defined deviant group, as explained elsewhere." [R.T. 4482].

That is the way the court instructed the jury [J.A. 239].

When the court advised counsel that it was going to instruct on deviant groups, petitioners objected strenuously [R.T. 4483], pointing out that the court would never be able to define what "the clearly defined sexu-

ally deviant group is, because there has been no evidence on it and it is going to be pure speculation, and it would render the statute as applied unconstitutional. . . ." [R.T. 4484]. Petitioners expressed open disbelief when the court stated that it intended to advise the jury that "the prurient appeal requirement may *also* be assessed in terms of sexual interest of the intended or probably recipient group" [R.T. 4485] (emphasis added). To so instruct the jury, petitioners argued, would render "the statute unconstitutionally vague in a sense that is unbelievable, and it is not supported by the evidence. It is wrong and it is confusing and it is impossible to work with and it is an instruction that [petitioners] object to vigorously." [R.T. 4486].

Petitioners also objected in writing to the proposed charge [C.T. 918, 920, 921, 933-934], pointing out that giving the instruction on the appeal to sexually deviant groups "is a blatant return to the *Hicklin* test which was condemned as being unconstitutionally restrictive in *Roth*" [C.T. 934]. Finally, after the trial court instructed the jury, petitioners, in compliance with Rule 30, objected to the charge which left the jury free to return a verdict of guilt even if the brochure did not appeal to the prurient interest of the average person [J.A. 262]. See, *Stromberg v. California*, 283 U.S.359. The instruction was contrary to the principles enunciated in *Roth*, *Memoirs*, *Mishkin* and *Miller*. As construed by the said instruction, §1461 was rendered unconstitutionally vague and broad.

B. The Trial Court Committed Reversible Error When It Permitted the Government to Adduce Evidence That Pictures Which Appeared Both in The Illustrated Report and the Brochure Appealed to the Prurient Interest of Sexually Deviant Groups.

Over the continuing and strong objections of petitioners [J.A. 148, 158-163; R.T. 1696, 1701, 1739-1745], the Government's alleged expert psychiatrist was permitted to testify that certain pictures found in both *The Illustrated Report* and the brochure appealed to the prurient interest of sexually deviant groups. The trial court, in permitting testimony with respect to the appeal of the material to a sexually deviant group, stated that it did not know what the "Supreme Court" meant "by the average man". [R.T. 1747, 1749].[8] The court below assumed that the opinion testimony of the Government's psychiatrist constituted a variance of proof under the Government's answer to the bill of particulars, but stated that this was not prejudicial because his testimony with regard to sexually deviant groups was directed to the charged *The Illustrated Report* and the sole direct testimony concerning the brochure was that it had an appeal to "pruriency" (481 F.2d at 321) and because petitioners' own experts allegedly covered the same field (481 F.2d at 322).

The court below was in error on both counts. The specific pictures which the Government's psychiatrist testified appealed to the prurient interest of sexually deviant groups *were the same pictures* as those appearing

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[8]In *Miller*, the Court said: "[T]he primary concern with requiring the jury to apply the standard of 'the average person, applying contemporary community standards' is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible . . . person. . . ." (413 U.S. at 33).

in the brochure. [R.T. 1697, 1698, 1700-1703, 1708-1709]. Thus, the jury was told by the Government's witness that the pictures in the brochure appealed to the prurient interest of sexually deviant groups.

In stating that the testimony of the Government's psychiatrist was not prejudicial because the petitioners' expert allegedly covered the same field, the court overlooked the fact that petitioners at the trial, before asking their own expert whether the material appealed to the prurient interest of any sexually deviant group, specifically requested the trial court to strike the Government's testimony concerning the appeal of certain pictures to sexually deviant groups and to limit the trial to the impact of the material upon the "average person". It was only when the court refused to limit the testimony that petitioners were compelled to meet the Government's testimony by their own witnesses [J.A. 158-163].

C. The Trial Court Committed Reversible Error in Failing to Instruct the Jury, as Requested by Petitioners, That "Prurient Interest" Must Be Measured by Nationwide Standards.

In *Miller*, the Court stated that under *Memoirs* a national standard of First Amendment protection had to be used in determining what appeals to the "prurient interest" (413 U.S. at 30). In this regard, petitioners asked the trial court to instruct the jury as follows [C.T. 736]:

> "If the material does not appeal to your prurient interest, you may take that fact into account in determining whether it appeals to the prurient interest of the average person, in the Nation as a whole. But you must bear in mind that even if the material may appeal to your prurient interest,

that does not mean it appeals to the prurient interest of the average person, in the Nation as a whole. The evidence in this case establishes that we are a pluralistic society and that sexual material does not have a uniform impact upon people. Rather, the same material may have a quite different effect upon persons, depending upon age, sex, education, religion, marital status and the like." [See also, C.T. 915, 918, 919, 920].

The trial court refused to give this instruction and never advised the jury that it was required to measure the "prurient appeal" of the material by national standards. Indeed the jury was never told by what standards it was to measure the "prurient appeal" of the brochure. The jury was thus left up in the air as to whether to measure the prurient appeal of the brochure by "world-wide, nation-wide, section-wide, state-wide, country-wide, precinct-wide or township-wide" standards. See, *Ginzburg v. United States,* 383 U.S.463, 480 (Black, J., dissenting).

In *United States v. Klaw,* 350 F.2d 155, 165 (2 Cir. 1960), the court said:

". . . Assuming that 'prurient appeal' can be adequately defined, there are still some questions: appeal to whose prurient interest? judged by whom? on what basis? For example, is it the 'average person' who applies 'contemporary community standards' to determine if the 'dominant theme' appeals to 'prurient interest' (of someone)? Or is it someone else applying 'contemporary community standards' to determine that the 'dominant theme' appeals to 'prurient interest' of the 'average person'? Do 'contemporary community

standards' operate to reduce potential prurient appeal? Or do they operate to establish that some 'redeeming social importance' is present? Or, do they operate to measure the 'patent offensiveness' of an excess of candor? Again, does the 'dominant theme, indicate that the prospective prurient appeal is great or slight? Or does it suggest that other themes will supply the redeeming social importance? . . ."

The trial court's failure to instruct on the appeal of the "prurient interest" of the brochure measured by national standards, as it was required to do under *Memoirs*, and its erroneous instruction regarding the appeal of the brochure to "sexually deviant groups", rendered the statute unconstitutionally vague and broad.

IV.

The Provisions of Title 18 United States Code §1461, on Their Face and as Construed and Applied, Violate the Free Speech and Press Provisions of the First Amendment and the Due Process Provisions of the Fifth Amendment, Because the Trial Court Instructed the Jury That It Could Find the Brochure Obscene Even if the Brochure Did Not Meet the Roth-Memoirs Test if the Jury Found "Pandering", Notwithstanding the Fact That Neither the Statute nor the Indictment Fairly Advised Petitioners That They Were Charged With Pandering.

Petitioners were convicted of "pandering" a brochure, although the Indictment did not allege pandering in any form. At the commencement of the trial, petitioners insisted that pandering could not be part of

the Government's case since it was not charged in the Indictment [R.T. Vol. D, 43-46; R.T. Vol. E, 60]. Petitioners sought, unsuccessfully, to require the Government to elect whether it was charging the material with being obscene *per se*, or whether it was charging "pandering" [R.T. Vol. E, 63, 67, 70]. At trial, there was absolutely *no* evidence that the brochure, found obscene by the jury, was "pandered". Nevertheless, the trial court, over petitioners' objections, instructed the jury extensively on pandering. The jury was instructed that it was not limited to the brochure itself [J.A. 245]; that even if the brochure did not meet the threefold test, the jury was free to find it obscene if it found that the brochure was "produced and sold as stock in trade of the business of pandering" [J.A. 245]. Pandering, the jury was told, "is the business of purveying textual or graphic matter openly advertised to appeal to erotic interest of the customer. It is a deliberate representation of publications as erotically arousing, an attempt at titillation, rather than saving intellectual content" [J.A. 245]. Pandering evidence, the jury was told, "is pertinent to all three elements of the basic test of obscenity" [J.A. 245].

Petitioners objected to the court giving a pandering instruction upon the grounds that it was constitutionally impermissible, misleading, inaccurate, highly prejudicial and confusing, and failed to state the applicable law of the case [C.T. 926]. Petitioners also submitted that a pandering instruction could not be given since the Grand Jury which returned the Indictment did not allege pandering and the giving of such an instruction would render the statute, as construed and applied, unconstitutional, in violation of the free speech, due

process and Grand Jury provisions of the First and Fifth Amendments [C.T. 926].

Petitioners pointed out that in *United States v. Pinkus*, 333 F.Supp.928 (C.D. Cal. 1971), the court held that the Government was barred from attempting to utilize the "pandering" doctrine announced in *Ginzburg v. United States*, 383 U.S.463, if the Indictment failed to allege pandering. "It is fundamental that a defendant cannot constitutionally be convicted of an offense not charged in the indictment. . . . I adhere to the principle that a person is entitled to be informed of what he is being prosecuted for having done. If proof of pandering is to make a difference as to obscenity [the] defendant must first be charged in the indictment with such pandering." (333 F.Supp. at 932).

The pandering instruction, petitioners argued, should not be given in light of the enactment by Congress of 39 U.S.C. §3008, found constitutional in *Rowan v. United States Post Office Dept.*, 397 U.S.728 since that statute provided that "pandering advertisements" could be sent through the mail until such time as an offended addressee requested the Post Office Department to issue an order prohibiting further mailings [C.T. 926].

Petitioners also argued that a pandering instruction, if it was to be given at all, would have to be limited to Counts 19, 20 and 21 (which alleged that the book was obscene), since an advertisement could not pander itself [C.T. 926].

At the time of the pre-jury instruction conference, petitioners objected to the portion of the pandering charge which stated that pandering is pertinent to all three elements of the test. Pandering, petitioners ar-

gued, "applied at most to its impact upon 'social value'" [R.T. 4498].

The importance of the pandering instruction in the case at bar can be seen from the fact that after the jury had begun its deliberation, it requested the court to reread its instructions on obscenity *and pandering* [R.T. 4989-4990]. Petitioners again objected to the giving of the "pandering" instruction [R.T. 5012-5013].

In 1967, Congress enacted 39 U.S.C. §3008 entitled "Prohibition of Pandering Advertisement in the Mails". That Section provides a procedure whereby any householder may insulate himself from advertisements that offer for sale matter "which the addressee in his sole discretion believes to be 'erotically arousing or sexually provocative'" [39 U.S.C. §3008(a)]. This statute was found to be constitutional. *Rowan v. United States Post Office Dept.*, 397 U.S.728. In *Rowan*, the Court said that the statute was intended to remove the right of the Government to involve itself in any determination of the content and nature of "objectionable materials" (397 U.S. at 733). The legislative history of the statute discloses that its provisions were "not intended to prohibit" pandering material from being sent through the mails, "if the individual to whom it is addressed wishes to receive it." Report of the Senate Post Office and Civil Service Commission [Senate Report, No. 801]; 2 U.S.C. Cong. and Adm. News (90th Cong. First Sess. 1967), page 2295.

In the case at bar, the evidence reveals that each addressee who testified requested and obtained a prohibitory order pursuant to 39 U.S.C. §3008. They each testified that thereafter they never received any further advertisements from any of the petitioners. In

short, the evidence shows that 39 U.S.C. §3008 fulfilled its function [J.A. 101-123].

Petitioners submit that Congress, having authorized the initial mailing of "pandering advertisements", the Government cannot now attempt to prove that petitioners violated 18 U.S.C. §1461 because they allegedly mailed such advertisements.[9] To so construe and apply 18 U.S.C. §1461 would render it unconstitutional. *Rabe v. Washington*, 405 U.S.313. In this connection, petitioners asked the court to instruct the jury that Congress had passed a law which recognized that it is not a criminal offense to mail unsolicited sexual advertisements; that the law assumes that there will be people who desire to receive such advertisements and people who do not desire to receive them; that the law secures the right of all persons, including the petitioners, to mail such advertisements to persons who desire to receive them; that with regard to those who do not desire to receive them, the remedy Congress chose was to have the Postmaster General order the mailer to discontinue such mailings to those persons who have asked for a prohibitory order. Finally, petitioners requested the court to instruct the jury that it was not free to find petitioners guilty under the Indictment herein "merely because you may find that the [petitioners] . . . have mailed unsolicited sexually oriented advertisements to persons who did not desire to receive such advertisements." [J.A. 71-72]. The court refused to so instruct the jury.

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[9]Petitioners deny that the brochure was, in any event, a "pandering" advertisement. The brochure does not "proclaim" the book it advertises to be obscene. Instead, the text of the brochure asserts the very opposite. The entire purport of the brochure is that *The Illustrated Report* furthers knowledge and understanding of an important social issue.

In *United States v. Pellegrino*, 467 F.2d 41 (9 Cir. 1972), the court held that an advertisement cannot pander itself where, as here, it fairly and accurately describes the book it advertises. The court stated:

> "Appellant contends that pandering in the *Ginzburg* sense is never relevant to the question of whether advertising in itself is obscene, since advertising does not 'pander' itself. *Ginzburg*, it is argued, did not make pandering a distinct offense. The Court there was considering the obscenity of the advertised works themselves in the context of their promotion. Here the question, appellant asserts, is whether the advertising, standing alone, is obscene. The only 'context' is the material itself which speaks for itself. There is no occasion to give consideration to other material for the light it can shed on the nature of the material in question.
>
> "We agree that in the case of advertising the fact that such material constitutes or includes pandering does not serve the purpose of enlightenment served in *Ginzberg*. . . ." (467 F.2d at 46).

The text of the brochure herein is set forth in the opinion of the court below (481 F.2d at 316). The first page is an exact replica of the book it advertises, except for the words "THE ALL-AMERICAN COP-OUT". Those words have reference to the fact, also mentioned in the brochure, that the President had dismissed the facts set forth in *The Commission Report* "out of hand". There is not a word in the text which seeks to sell the book by an appeal to the "erotic interest" of the customers. The text of the brochure is

not on the "sexually provocative aspects" of *The Illustrated Report.*

Notwithstanding the fact that the brochure neither pandered itself nor the book it advertised, the court below erroneously held that it was proper to instruct the jury that the brochure could pander itself (481 F.2d at 323). In this the court was in error. See, *United States v. Books, Inc.*, 388 U.S.449, rvsg. 358 F.2d 935 431 F.2d 272 (9th Cir. 1970). See also, *United States v. Palladino*, 475 F.2d 65, 71 (1 Cir. 1973); *Spinar v. United States*, 440 F.2d 1241 (8 Cir. 1971); *Luros v. United States*, 389 F.2d 200 (8 Cir. 1968).

V.

The Brochure at Issue Is Protected by the Free Speech and Press Provisions of the First Amendment to the United States Constitution. It Is Neither Obscene in Fact nor in Law.

The government witnesses and petitioners' witnesses agreed that the brochure herein is intimately linked to the book it advertises. The Government's alleged expert on social value referred to the brochure as "a kind of a miniature of the book itself" [R.T. 2372]. Petitioners' witnesses on social value each expressed the view that the brochure has social value in part because it advertises an important book. As the court below observed, the opinions of petitioners' experts were "that the Report with its illustrations had great social value, and four of the experts testified that in their opinion the Brochure had redeeming social value and was not obscene" (481 F.2d at 311).

As heretofore noted, the jury did not agree with the Government's contention that *The Illustrated Report* was obscene. Indeed it could reach no decision with

regard to *The Illustrated Report*. Since all communications are presumed to be protected by the First Amendment until found to be outside such protection, *The Illustrated Report* is presumptively protected expression. In response to petitioners' argument that the brochure is protected by the First Amendment because it is a fair and accurate advertisement for a constitutionally protected book, the court below replied: "The premise is false. . . . If there be a presumption of the protection of the Report then a query of the bona fides of the Brochure as a protected advertisement is in order." (481 F.2d at 315). The court recognized that a different panel of the Ninth Circuit, in *United States v. Pellegrino*, 467 F.2d 41 (9 Cir. 1972), held that a brochure containing pictures which the court below believed were "hard core pornography" (481 F.2d at 320) was nevertheless protected, because the "obscene" pictures were "presented as illustrating various aspects of the book's claimed contributions to general knowledge. . . ." The court below sought to distinguish *Pellegrino*, saying that "the advertised Report as well as the advertising Brochure are under charge of obscenity. While we are not dealing with the charges against the Report on this appeal, it is considered necessary to place it in some context with the Brochure." (481 F.2d at 315). The court then stated that unlike the *Pellegrino* brochure the portrayals in the brochure herein "are not accompanied by any text and do not purport to be related to any material in the Report." (481 F.2d at 315-316). The court below was of the opinion that "whatever bona fide advertising attributes the *Pellegrino* brochure may have had the Brochure here has none. . . . It was for the jury to determine whether the Brochure had any

redeeming social value to justify its own position." (481 F.2d at 317). The court concluded that petitioners' claim "that the Brochure is inseparable from the Report is untenable and as such loses any constitutional protection as a legitimate advertisement of an asserted protected book." (481 F.2d at 317).

Initially, it should be observed that every picture in the brochure was also in *The Illustrated Report*. As heretofore stated, the Government stipulated that every picture in *The Illustrated Report* was related to the text of the official *Report;* and that pictures similar to those appearing in *The Illustrated Report* were used in various research activities that the Commission undertook [J.A. 163-166]. That the official *Report* of the Commission is itself of great political and social value cannot be disputed. *The Illustrated Report* has similar political and social importance. See, *e.g.*, Judge Aldrich's reference to *The Illustrated Report* in *United States v. Palladino*, 475 F.2d 65, 75-76, n.1 (1 Cir. 1973). The record herein establishes that *The Illustrated Report* with its pictures is more valuable than the official *Commission Report*. One of petitioners' witnesses, Commissioner Otto N. Larsen, Chairman of the Effects Panel of the Commission, testified that the illustrations enhanced the value of the *Report;* that the illustrations made clear what the *Report* was discussing and made it easier for persons to make judgments as to the recommendations made by the Commission [R.T. 4229-4286]. Dr. Cody Wilson, Executive Director and Director of Research of the Commission, also testified that *The Illustrated Report* was more valuable than the official *Report*, precisely because of the pictures contained in *The Illustrated Report* [R.T. 3354].

In *United States v. Palladino*, 475 F.2d 65 (1 Cir. 1973), vacated 413 U.S.916, the court held that an advertisement for a work entitled "The Photographic Deck of Sexual Love" was protected as a matter of law upon the jury finding that the advertised work was not obscene. "[S]ince the jury here necessarily held the advertisement for 'The Photographic Deck of Sexual Love' not obscene" by reason of the fact that it held the advertised work not obscene, "the government may not again introduce [the advertisement] into evidence to establish the crime of mailing obscene matters." (475 F.2d at 74). Following remand, the First Circuit reversed the judgment of conviction, ... F.2d .... (1 Cir. 1974, No. 72-1005). Concerning the advertisement for the "Photographic Deck of Sexual Love", the court said: "[W]e retain the ruling that because the jury held 'Photographic Deck of Sexual Love' to be non-obscene, consistency requires that the advertisement (which contained a partial presentation of the same photographs) be non-obscene as well".

A. The Record Establishes That the Brochure Has Social Value and Serious Political Value.

The brochure fairly and accurately advertises *The Illustrated Report*. It advises the reader, accurately, that *The Illustrated Report* contains the complete text of the official *Report*. It states, correctly, that the depictions contained in the brochure, taken from *The Illustrated Report*, could have been part of the studies made by the Commission. The brochure emphasizes that the President is to be criticized for dismissing *The Commission Report* "out of hand"; that suppression of the *Report* is demeaning to every adult; that adults should be allowed to make their own decisions and

that many of them probably will do so after reading *The Illustrated Report;* that the book is a "MUST" for the research shelves of every library seriously concerned with intellectual freedom and adult selection. In short, the brochure communicates information about the book it is advertising; expresses opinions about it; expresses political views concerning the subject of obscenity; and urges the public to read *The Illustrated Report.*

Dr. Wilson testified that the brochure "is an advertisement for a book that contains a great deal of information, of facts, relative to a very important issue in our society, and that it has importance in trying to communicate the existence of this book and asked them to buy it and to read it." [J.A. 170]. On cross-examination, he elaborated on this theme [J.A. 177-182], concluding that since the brochure advertised a book that has social value and since *The Illustrated Report* does present the kind of ideas the brochure claims that it does, the brochure is valuable.

Commissioner Larsen testified that the brochure fairly advertised *The Illustrated Report* and had social importance for essentially the same reasons that the book had social importance [J.A. 19]. After testifying to the importance of advertising, particularly in connection with the sale of books, he testified that the brochure in question tells the person what the book is about; it represents the material fairly; it makes an argument for purchasing the book; and tells how it may be obtained [J.A. 191]. The brochure, he testified, makes a strong claim about why the book should be purchased [J.A. 192]. It puts a complex social issue into a political framework and, in so doing, reflects accurately that the official *Report* was received negatively

by political leaders. The brochure politicalized the issue by stating that "even the President dismissed the facts [found by the Commission] out of hand", and that this is "an inexcuable insult directed at every adult in this country" [J.A. 192-193]. By focusing upon the political issue, Commissioner Larsen stated that the advertisement might attract the attention of people desirous of finding out what the President was objecting to [J.A. 193]. In addition to being a political issue, Commissioner Larsen believed that the *Report* also raised social, family, community and moral issues [J.A. 193].

Commissioner Larsen described the brochure as quite similar to brochures large publishing companies use in advertising textbooks [J.A. 199]. These brochures, like the brochure at issue, "often include a montage of photographs that are used in the text, and then a . . . message" which states in effect, "this is what you need and here is where you get it" [J.A. 199]. The brochures used by the major publishers are usually two pages, like the brochure at bar, and "is in color and [attempts] to attract the attention of the viewer" [J.A. 199]. In short, Commissioner Larsen testified that the format of the brochure in question is essentially the same as the format customarily used by major publishers in selling textbooks [J.A. 199-200]. Since *The Illustrated Report* deals with explicit sexual material, it is quite proper, he testified, for the brochure to use explicit sexual material to attract attention [J.A. 200]. In addition to the illustrations, the brochure emphasized "the monumental work of research and investigation" of the *Report*, and "the right of [an individual] to have access to [*The Illustrated Report*] and make up [his] own mind" [J.A. 200].

Commissioner Larsen testified that the emphasis on the right of free choice was the critical issue at stake [J.A. 200]. Some people, he thought, would be more upset about the statement concerning the President than they would about the pictures [J.A. 201]. Commissioner Larsen also testified that the pictorial portion of the brochure has social value because there is great curiosity about such representations and the public has demonstrated its interest in such material by purchasing similar material and apparently deriving value from such material [J.A. 208]. Such pictures evoke positive reactions from people; they enhance communication among married persons; they are informative, without causing damage.

Dr. Jack Haberstroh, an advertising expert and Assistant Professor of Advertising in the Journalism Department of San Diego State College, described the brochue advertising *The Illustrated Report* as a factual, straight-forward, serious and truthful advertisement [J.A. 187]. It was his opinion that the brochure had redeeming social value because it honestly promotes the sale of a book that has great social significance [J.A. 187]. By acknowledging that there was dissent concerning *The Commission Report*, the brochure was within a frame of reference of social value [R.T. 4002]. Dr. Haberstroh did not find the photographic illustrations in the brochure misleading or detracting from its social value [R.T. 4002-4003]. On the contrary, he said: "Taken as a whole, the photographs and the mail piece itself . . . is probably a more truthful kind of mailing piece of advertising than many others which have nothing to do with sexually explicit material" [R.T. 4003].

On cross-examination, Dr. Haberstroh stated that the brochure in question is more honest than many advertisements for products such as toothpaste, perfume, shaving cream etc., which falsely promise sexual success if only the product is bought and used [R.T. 3999-4003, 4035-4036]. He pointed out that the brochure in question, unlike many other advertisements, did not contain any "double entendre statements" or any sexually stimulating statements [R.T. 4036].

Commenting about the statement in the brochure, "Thanks a Lot, Mr. President", Dr. Haberstroh testified that it referred to the fact that President Nixon disavowed the work of the Commission and that the statement is a very serious comment and commentary about the Administration in Office [J.A. 187]. Dr. Haberstroh testified that the brochure had to be considered in terms of the particular book it was selling and that the book had a message that all persons ought to be listening to. "If we object to the present obscenity and pornography laws, or if we are in favor of the present obscenity and pornography laws . . . we should be listening to the message contained in this book", which the brochure advertises [J.A. 189-190].

Dwight W. Swain, a Professor of Journalism at the University of Oklahoma, and a man with a vast practical experience in the mass media [R.T. 3753-3783], also testified that the brochure had redeeming social value [J.A. 185].

The Government called a single witness in its attempt to establish that the brochure was without redeeming social value. Mr. Frank Getlein, a newspaper man without other credentials, testified that the brochure was without social value for the same reasons he

believed *The Illustrated Report* was without social value [J.A. 149-150]. As heretofore noted, he referred to the brochure as "a kind of miniature of the book itself" [R.T. 2372]. Referring to the textual portion of the brochure, he said: "[It] is simply a selling piece with kind of a pass at liberty of expression and learning etc., being made very faintly even in that [J.A. 151].

B. The Record Establishes That the Brochure Is Not Patently Offense to National Standards or to Standards of the Southern District of California.

Both Commissioner Larsen and Dr. Wilson testified at length that the brochure was not patently offensive and did not go substantially beyond customary limits of candor in the description of sexual matters. They each relied on scientific surveys and studies that indicate that similar material is generally available and acceptable throughout the Nation, and that people have voluntarily exposed themselves to such materials to satisfy a normal curiosity and do not find such material patently offensive.

Dr. Wilson testified that pictures as explicit as those at bar are available and acceptable throughout the Nation, and that people voluntarily buy and view substantial numbers of publications containing similar illustrative material [J.A. 166-167]. Dr. Wilson had great familiarity with the degree of acceptance of sexually explicit material throughout the Nation [R.T 3575] and in San Diego, within the Southern District of California [R.T. 3575-3581].

Commissioner Larsen testified that the tolerance level for sexually explicit material has greatly broadened over recent times and that if there has been a sex-

ual revolution it has been a revolution in the communications aspect of such materials [R.T. 4235]. The scientific studies and his personal experience convinced him that substantial numbers of persons were not offended by pictorial material such as that at bar [R.T. 4325]. The pictorial material, he testified, is not patently offensive because the range of reaction to such material is highly variable [R.T. 4235]. It is a social fact, he testified, that people are not automatically offended by such materials [R.T. 4236]. From responses of students and large audiences, he found that people were willing to look at such pictures [R.T. 4236].

A national survey, conducted on behalf of the Commission, revealed that a majority of the American people (almost 60%) believed that adults should be allowed to read or see any explicit materials they desired. The survey, and the additional studies, conducted by the Commission indicate that the American people have an enormous interest and tolerance for sexually explicit material; that they voluntarily expose themselves to such material and find benefit in doing so; that the marketplace contained and the American people accepted sexually explicit material similar to the pictures at bar. In light of the changing standards of acceptability of sexual material and the tolerance and interest shown by the American people for such material, Commissioner Larsen was of the opinion that the pictures at bar were not patently offensive and did not go substantially beyond customary limits of candor in the Nation as a whole [R.T. 4228-4229, 4247-4250, 4262-4265, 4314-4322].

Commissioner Larsen testified that the brochure did not patently offend national standards for the additional reason that "the tolerance level for what goes

on in advertising is probably greater than in any other sector of American life given the vast experience we have had with [advertising]" [J.A. 194].

The Government again relied on Mr. Frank Getlein as its sole witness on the question of customary limits of candor. His qualifications on this aspect of the case consisted of having visited a number of adult bookstores in various parts of the country and talking casually to various persons on the subject as he traveled throughout the country. In the twelve months prior to his testifying, he had visited only three adult bookstores and, while there, was unable to see the contents of most of the material because they were wrapped in cellophane and he never purchased any publications from those stores [R.T. 2297-2298, 2306, 2493]. He testified that in his opinion the brochure went substantially beyond customary limits of candor in depicting sexual matters [J.A. 194-195].

On cross-examination, Mr. Getlein conceded that a photograph of a female touching the genitalia of a man is not beyond customary limits of candor [J.A. 152]. He also testified that a photograph of mouth genital contact with the penis of a man was within contemporry standards [J.A. 153], although such a picture "would not appear in Life Magazine" [J.A. 154]. Similarly, a photograph of cunnilingus, he testified, is within community standards [J.A. 154]. Such photographs, and the acts themselves, he testified, are "obviously accepted by the community as within its standards" [J.A. 153].

C. The Record Establishes That the Brochure Does Not Appeal to the Prurient Interest of the Average Person.

Commissioner Larsen and Dr. Wilson testified that the brochure did not appeal to the prurient interest of the average person. Both witnesses relied heavily upon the empirical data from the extensive surveys and scientific studies engaged in by the Commission [J.A. 167-169, 193-194, 201; R.T. 3521, 3522; 4232, 4287-4291]. This scientific empirical data demonstrates that pictures similar to those in the brochure have a variety of appeals and a variety of responses, depending in part on the message and, in part, on "the eye of the beholder"—what he has experienced and his predispositions [R.T. 4232; 3521]. Persons will react differently to sexually explicit material, depending on such factors as age, education, size of community, attendance at a place of worship and sexual experiences [R.T. 3521; 4232-4233, 4287-4295]. Some people looking at sexually explicit material will call it "disgusting", while others looking at the identical material will call it educational, entertaining or informing [R.T. 4288]. Empirical data indicates that most people in America voluntarily expose themselves to pictures similar to those at bar without harm and without having their prurient interest aroused [R.T. 3521, 3536]. The consensus of informed professional opinion is that such pictures appeal to the natural curiosity of the average person and not to any prurient interest [R.T. 3522, 3546, 3684-3695].

Both Commissioner Larsen and Dr. Wilson also viewed the brochure as an appeal to reason rather than an appeal to prurient interest. They both testified that the extensive scientific research carried out by the Effects Panel of the Commission persuaded them that the pictures in the brochure do not evoke the lustful, shameful, morbid reactions which are the ingredients of prurient interest [R.T. 3521-3522, 3536-3538, 3546, 3672, 3683, 3685-3695; 4233; 4243-4246; 4247; 4288-4292; 4321-4323].

The Government relied solely on Dr. Melvin Anchell, a self-proclaimed psychiatrist [R.T. 1586] on the prurient interest issue. Dr. Anchell was a general practitioner of medicine in Texas, when he decided, on his own, to practice psychiatry. He is not a Board certified Psychiatrist, nor has he ever had published any articles in professional medical journals [R.T. 1606-1635, 1638]. Dr. Anchell's testimony concerning the brochure was limited to a single word. When asked for the dominant theme of the brochure, he answered "pruriency" [J.A. 147].

D. Documentary Evidence, Introduced by the Government, Establishes That the Brochure Is Not Obscene.

Documentary evidence introduced by the Government itself establishes that the brochure is not obscene. The Government introduced *The Report of the Commission on Obscenity and Pornography* as Exhibit 22. This evidence, introduced by the Government, contains relevant empirical data bearing on each of the three elements of obscenity, and supports the testimony of petitioners' experts that the brochure does not appeal to prurient interest, is not patently offensive, and is not utterly without redeeming social value [*Commission Report*, 352-357].

E. The Government Failed to Discharge Its Burden of Proving Under Our Criminal Standards That the Brochure Was "Utterly Without Redeeming Social Value", Patently Offensive to "National Standards" and Appealed to Prurient Interest, Applying "National Standards".

In *Miller v. California*, 413 U.S. at 21-22, the Court recognized that prior to June 21, 1973, the *Memoirs* three-pronged test was the law of the land. Until *Miller* was decided, "*Memoirs* required that to prove obscenity it must be affirmatively established that the material [was] 'utterly without redeeming social value'. . . . *Memoirs . . . called on the prosecution to prove a negative, i.e.,* that the material was 'utterly without redeeming social value'—a burden virtually impossible to discharge under our criminal standards of proof." In the case at bar, the Government plainly failed to meet this "virtually impossible to discharge" burden of proving beyond a reasonable doubt that the brochure is "utterly without redeeming social value".

The Government similarly failed to meet its heavy burden of proving that the brochure was patently offensive to national standards and appealed to the prurient interest of the average person in the Nation as a whole. As heretofore observed, this Court stated in *Miller* that when triers of fact are asked to decide whether the average person, applying contemporary community standards, "would consider certain materials 'prurient', it would be unrealistic to require that the answer be based on some abstract formulation. . . . To . . . structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility. . . . [A] 'national' standard of First Amendment protection enumerated by a plurality of this Court [in *Memoirs*] was correctly regarded at the

time of trial as limiting . . . prosecution under the controlling case law." (413 U.S. at 30-31) (Emphasis in original). The Government's skimpy proof totally failed to meet the high standards required in every criminal case (see, *In re Winship*, 397 U.S.358, 361-364), and particularly required in criminal cases touching on First Amendment rights. See, *Gojack v. United States*, 384 U.S.702; *Speiser v. Randall*, 357 U.S.513; *New York Times Co. v. Sullivan*, 376 U.S.254.

VI.

Petitioners Were Denied a Fair Trial, and Due Process of Law, When the Trial Court, in Open Defiance of Rule 30, Federal Rules of Criminal Procedure, Denied Petitioners the Opportunity to Make Objections to the Court's Jury Charge Outside the Presence of the Jury.

A. Rule 30 of the Rules of Criminal Procedure reads, in relevant part, as follows:

> ". . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury *and, on request of any party, out of the presence of the jury.*" (Emphasis added).

In 1966, Rule 30 was amended by adding the italicized words. Notwithstanding the clarity of the Rule, the trial court denied petitioners' request that they be given an opportunity to make their objections out of the presence of the jury. After the court instructed the

jury, the following colloquy occurred between one of petitioners' counsel and the court [J.A. 257]:

"MR. FLEISHMAN: . . .

"I think the matter is at this stage very sensitive with the Jury here. I would suggest it wouldn't take long, perhaps not more than four or five minutes, but I would urge the Court to ask the Jury to go into the jury room while we present [our objections].

"I gather that sometimes words drift over to the jury at this stage of the proceedings.

"THE COURT: You have made all the objections suitable that I can think of. I want to send this Jury out. If you want to make a statement, make a statement.

"MR. FLEISHMAN: I would ask the Court if it is convenient, that they be excused for a few moments.

"THE COURT: No."

Thereafter, counsel was compelled to make objections to the judge's charge in the presence of the jury, and possibly in the hearing of the jury.

The objections covered a wide area, including the court's erroneous reference to a "magazine" instead of an advertisement; the court's instruction concerning expert witnesses; the court's instruction on the number of witnesses called by each side; the court's improper use of the term "indecent character"; the court's instruction on "knowledge"; the court's failure to make any reference to knowledge concerning Counts 2 through 5 and 7 through 13,[10] the court's instruction that the

[10]See [J.A. 231].

belief on the part of the petitioners that the material is not obscene is absolutely irrelevant; the court's instruction that material appeals to prurient interest if it has a *tendency* to incite lustful thoughts,[11] the court's instruction on "prurience"; the court's instruction concerning homosexuals as a clearly defined sexually deviant group,[12] the court's instruction that the prurient appeal of the material could be measured by its impact upon undefined sexually deviant groups; the court's instruction that the jury could consider "pandering" with regard to each and all of the elements of obscenity; the court's failure to give petitioners' tendered instructions on the essential elements of the offense; the court's failure to give an instruction based upon *United States v. Baranov*, 418 F.2d 1051 (9th Cir. 1969). Petitioners argued that the court's charge denied petitioners due process of law and denied them rights to freedoms of speech and press secured by the First Amendment. Petitioners were also forced to object in the presence of the jury to the court giving the Indictment to the jury to take into the jury room [J.A. 258-265].

Following all of this, the only further instruction the court gave to the jury was as follows [J.A. 265].

> "If during my instructions I referred to the advertisement as a 'magazine', rather than an advertisement, please disregard that reference."

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[11]Petitioners requested the court to instruct the jury that it was required to find, *beyond a reasonable doubt*, that the material aroused lustful thoughts [J.A. 261].

[12]The court instructed the jury that an example of a clearly defined sexually deviant group would be homosexuals [J.A. 240]. Counsel for petitioners were not informed that the court intended to give this instruction [J.A. 262].

B. The court below recognized, of course, that the trial court violated the plain command of Rule 30, saying: "While hindsight is very good at telling us that compliance with the rule would have been the right thing to do, it does not answer the question in this case." (481 F.2d at 324). The court below treated the violation of Rule 30 as an "inconsequential" procedural error that did not prejudice petitioners, saying that the trial court "held an extensive and exhaustive conference by way of reviewing the requests and settling the instructions to be given", and that accordingly it "should have been clear" to petitioners "that the after instructing conference at the bench was to be a perfunctory record saving session" (481 F.2d at 324). Finally the court below said in this regard:

> "Whatever reaction the jury might have had from *seeing or hearing* any part of the bench conference was the result of counsel's own doings and unnecessary for the preservation of [petitioners'] record of objections. We conclude that there was no prejudice to any of the [petitioners] as a result of the procedural error on the part of the district court to literally comply with Rule 30." (481 F.2d at 325) (emphasis added).

C. Neither the record nor the cases cited by the court below support that court's conclusion.

The record demonstrates that the harmful reaction the jury might have had from seeing or hearing the bench conference was *not* the result of counsel's own doing, and the bench conference was necessary for the preservation of petitioners' record of objections. Initially, it should be observed that the conference settling instructions was not as "extensive and exhaustive" as

the court below seemed to think it was, nor were all the instructions there settled. The evening before counsel were to argue the trial court stated:

> ". . . The instructions that I propose to give relative to the substantive counts . . . are contained in that packet that you have. It is from that packet that I will choose one or more of the subjects to instruct upon . . . and it is from that packet that we will go over the instructions. Now I have not had an opportunity—although I have been working on the instructions you still caught me short—I have not had an opportunity to go into which one of those instructions I propose to give. . . . [W]e will get together . . . tomorrow morning early, before you . . . argue, and I will let you know which ones I propose to give and then we will take it from there." [R.T. 4442-4443].[13]

Many of the instructions remained unsettled. Thus, with regard to one instruction being discussed, the court said: "That's yet to be determined" [R.T. 4457]; with regard to another, the court stated: "I will consider it" [R.T. 4471]; with regard to yet another, the court stated: "I might have to redo this" [R.T. 4479]. When the Government submitted its proposed modification to the court's instruction on "prurience", the court advised the Government that it was free to submit an addendum if it felt it necessary [R.T. 4487]. When counsel for petitioners asked for an instruction limiting the "pandering" instruction the court indicated it would give, the court stated: "I will have an instruction . . . that will minimize that question. . . ." [R.T.

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[13]Petitioners filed the bulk of their proposed instructions on October 13, 1971, approximately seven weeks before the trial court conducted the pre-instruction jury conference [J.A. 5].

4492]. With regard to another Government request, the court said: "I will work it in there some place" [R.T. 4495]. When petitioners requested an instruction in accordance with the ruling in *United States v. Baranov*, 418 F.2d 1051 (9 Cir. 1969), Government counsel stated that he was not sure what the court meant to do, whereupon the court stated: "I will take a look at that. We will see. That may go out entirely." [R.T. 4502]. When petitioners' counsel submitted another instruction, the court stated: "All right, I will take a look at it." [R.T. 4504].

There was considerable confusion at the settlement conference, because many of the court's instructions were not numbered or otherwise easily identifiable [R.T. 4466, 4473, 4480, 4485, 4497].

As noted above, the trial court did not have its proposed jury instructions in perfect order at the time of the settlement conference. Following a colloguy on one instruction, the court said: "You write them and you think they are great, and when you read them they sound terrible. I guess that is called editing" [R.T. 4494].

Since the settlement conference was held on the morning when argument was to begin, the court pressed counsel for petitioners to accelerate his objections, saying: "I really feel that under the circumstances, having reviewed [the] instructions and reviewed the addendums to these instructions and additional instructions, that is completely unnecessary for the purposes of your record to go through this matter and I think we ought to get on with argument at this point." [R.T. 4515. See also, R.T. 4481].

The court below discussed three cases in reaching its conclusion that the trial court's violation of Rule 30

was not grounds for reversal. *Hall v. United States*, 378 F.2d 349 (10 Cir. 1967); *United States v. Fernandez*, 456 F.2d 638 (2 Cir. 1972); and *United States v. Schartner*, 426 F.2d 470 (3 Cir. 1970). Additionally, the court below stated, without citation, that the *Fernandez* rule "appears to abide also in the 5th Circuit." (481 F.2d at 324). In *Hall*, the appellant had been convicted of unlawful entry into and larcency from a federally insured bank. After the charge to the jury had been given, the following colloguy occurred (378 F.2d at 349-350):

> "The Court: I will ask of counsel for the plaintiff and defendant if there is any further record either side cares to make with reference to the trial of this case before the bailiff is sworn to take charge of the jury.
>
> Mr. Raley: Nothing for the Government, your Honor.
>
> Mr. Burton: I do have some things to—
>
> The Court: You may come to the desk here.
>
> Mr. Burton: May I make my record out of the presence of the jury, your Honor?
>
> The Court: You can make it right now.
>
> Mr. Burton: May the record show we are in the presence of the jury.
>
> The Court: But out of the hearing of the jury."

Thereafter, defense counsel briefly noted his formal objections to the charge and his reasons therefor, and handed to the court an instruction with a comment that he "thought it was to be given". The court then gave the additional instruction to the jury. The Government argued that the lack of literal compliance with Rule 30 was not prejudicial because at a pre-instruction conference "defense counsel was granted full op-

portunity to argue and record his objections to proposed instructions outside the hearing and presence of the jury", and in any event "the jury was not adversely impressed by the later bench conference for, 'from all outward appearances,' defense counsel won his point as evidenced by the giving of the 'further instruction' requested by the defense." (378 F.2d at 350). The Tenth Circuit found "no merit" in the Government's argument, saying (378 F.2d at 350):

> "The amendment to Rule 30 was intended to allow counsel full opportunity to argue and record objections to the court's instructions and, upon request, to do so outside the presence of the jury in order to avoid the psychological pressure of low-tone bench conferences leading to truncated presentations and understandings. Neither the merits of the objections nor the success of the advocates are pertinent to the proper application of the rule. . . ."

In *United States v. Fernandez*, 456 F.2d 638 (2 Cir. 1972), appellant was convicted of bank robbery. The Second Circuit reversed the conviction in part because Rule 30 was not followed. The court noted that counsel for appellant was required to make her objections in open court, "with the consequent danger that the jury might infer that counsel's points were without merit. Yet F.R.Cr.P. 30, as amended in 1966, provides, as F.R.Civ.P. 51 has always done, that, on request of any party, opportunity shall be given to object to instructions out of the presence of the jury. The rule is so plain, and its purpose so obvious, that we can perceive no justification for ignoring it. Here we need not go so far as to hold, as was done in Hall v. United States, 378 F.2d 349 (10 Cir. 1967), that

refusal to grant a request that objections to the charge be heard out of the presence of the jury calls for automatic reversal. However, enforcement of F.R.Cr.P. 30 demands a principle at least as severe as that which we have applied in civil cases. . . ." (456 F.2d at 644). In footnote 6 (*Id.*, at 644), the court said: "[W]e do not put aside the possibility that the correct test in criminal cases may be that reversal will follow 'unless it be demonstrable on an examination of the whole record that the denial of the right did not prejudice' a defendant's case. United States v. Schartner, 426 F.2d 470, 479-480 (3 Cir. 1970)."

In *United States v. Schartner*, appellant was convicted, *inter alia*, of knowingly jeopardizing the lives of two bank employees with a gun. The conviction was reversed in part because Rule 30 was violated. The Government contended that the trial court's refusal to obey Rule 30 was harmless. In rejecting this argument, the Third Circuit stated that the Government misconceived the function of Rule 30, and held that "there should be reversal for non-compliance with Rule 30 even where the defendant cannot affirmatively prove prejudice. Rule 30, as we have indicated, was designed to avoid subtle psychological pressures upon the jurors which would arise if they were to view and hear defense counsel in a posture of apparent antagonism toward the trial judge. . . . These pressures would be largely imperceptible, and it would be very difficult for a criminal defendant to prove their presence in a particular case. . . ." (426 F.2d at 479). In footnote 11 (*Id.*, at 479), the court said: "Every trial judge and trial lawyer is aware of jurors' sensitivity to the attitudes of counsel in their disagreements with the trial judge."

As noted above, the court below, without citing a case, asserted that the Fifth Circuit appears to be in accord with the rule announced in *United States v. Fernandez*, 456 F.2d 638 (2 Cir. 1972). It is evident that the court below had in mind the case of *Hodges v. United States*, 243 F.2d 281 (5 Cir. 1957), since it was cited by both the Government and petitioners. In *Hodges*, the Fifth Circuit reversed a conviction for noncompliance with Rule 30, even before the amendment of 1966. After citing the Rule, which then provided that "[o]pportunity shall be given to make the objection out of the hearing of the jury", the court held it was error to require counsel "to state his objections in the presence of the jury". The court recognized that at this stage of the proceedings the case was approaching its "decisive climax", and referred to the Rule as a wholesome one, "bottomed on good sense which ought not to be weakened by tacit approval of breaches under a too easy application of the rule on harmless error. . . . Promulgated presumably because the administration of criminal justice demonstrates that substantial and irretrievable harm can come if persons charged with crimes and their counsel are compelled in the presence of the jury to engage in what to untrained laymen may appear to be criticism and condemnation of the Court or the judge presiding over it, the avoidance of that harm can best be assured by genuine adherence to the spirit and practice of the rule. Where the breach is not technical, momentary or inadvertent, and the record indicates that the defendant has as best he might in the awkward embarrassment of the situation registered opposition to such proceeding, that there may be no affirmative, actual demonstration of harm does not relieve the reviewing court from most careful appraisal." (243 F.2d at 283).

In *United States v. Huffman*, 467 F.2d 189 (6 Cir. 1972), appellant was convicted of mailing letters which threatened the lives of the President and Vice President. The Sixth Circuit reversed in part because the trial court failed to comply with Rule 30. After the court delivered its instructions, the following proceedings occurred:

> "BY THE COURT:. . .
>
> "Now, any—any request for any further instructions? . . . [A]ny objections or exceptions?
>
> MR. WARNER [defense counsel]: May I approach the bench? I've got one or two points. Are we going to argue that now?
>
> BY THE COURT: We can go ahead and take them up while they're out.
>
> MR. WARNER: All right."

After the jury retired, defense counsel stated his objections. In reversing, the Sixth Circuit said the procedure used by the trial judge "frustrated the purpose of the rule to provide an opportunity for the court to make corrections before the jury begins deliberations. . . . Upon request, counsel must be permitted to make objections out of the presence of the jury. . . . With the jury absent, counsel may argue for suggested changes without risking alienation of the jury." (467 F.2d at 194-195). Judge Weick, dissented, arguing that defense counsel "did make known to the Court his acquiescence in and agreement with the action which the Court was taking by replying, 'All right.' He never made an objection thereto." (467 F.2d at 196).

D. The court below stated that it was "manifestly clear" to it that at the time the district court invited counsel to the bench it was the intention of the court,

and *should have been* on the part of all counsel as well, that the after-instruction conference at the bench was to be a merely perfunctory record saving session" (481 F. 2d at 324). The court below assumed, erroneously, that the pre-instruction conference rendered the last sentence of Rule 30 "inoperative". The court, it is respectfully submitted, has confused the purposes of the pre-instruction conference with the post-instruction requirement that defendants in a criminal case object specifically to those instructions given to the jury of which they disapprove.

In *Dunn v. St. Louis-San Francisco Ry. Co.*, 370 F.2d 681 (10 Cir. 1967), the parties had a pre-instruction conference pursuant to F.R.Civ.P.51. "An extensive on-the-record conference ensued in which the requests were discussed in minute detail. The court indicated certain areas in which it might reconsider, and stated that some requests would be given in substance. Each party noted its objections to a number of requests of the other that the court had accepted, and noted a blanket exception to all of its requests that the court shall fail to give." (370 F.2d at 683). Thereafter and following the charge, and before the jury retired, the trial court stated:

> "Now, gentlemen, may it be understood for the record that all objections and exceptions which heretofore were taken by respective counsel for the parties will be considered as if they were now made at this time and entered into the record, and have the same force and effect as if repeated on the grounds heretofore given." (*Id.* at 683).

The Tenth Circuit strongly condemned the trial court, stating the procedure followed was "turning upside

down the meaning and purpose of Rule 51" (*Id.* at 683). The court explained that the requirement that the trial court inform counsel of its proposed action upon requests prior to their arguments to the jury is so that counsel may argue intelligently. The post-instruction conference "is to provide an opportunity to take exceptions" (*Id.* at 683). In emphasizing the importance of objecting to instructions after they are given, the court said: "We scarcely need to repeat that the purpose is at least two-fold, to make it abundantly clear to the court not only what is the party's position, but in what way the charge is believed to depart therefrom, and to give the court full opportunity to make corrections." (*Id.* at 683). As the court stated, the duty imposed upon counsel of stating distinctly the matter to which he objects and the grounds of his objection cannot formally be performed until the charge has been heard in its entirety. "Usually until then it cannot be told 'distinctly' to what extent a request has not been given. . . . [A]n a priori exception 'to the extent that the request is not given in substance,' meets none of the rule's requirements." (370 F.2d at 684). In a warning that would throw a cold chill down the spine of trial counsel defending persons facing total prison terms in excess of 400 years and fines in excess of $700,000[14] the court said:

> "While we do not say that an objection may never be properly preserved to a charge in ad-

[14]In the case under consideration, 4 individuals and 3 corporations were charged in a 21-count indictment. Count 1 thereof carried a prison term of up to 10 years and a fine of up to $10,000, and the balance of the counts carried a prison term of up to 5 years and a fine of up to $5,000. Thus, each individual could be sent to prison for 110 years. Each individual and each corporation was subject to a fine of up to $110,000. This is no

vance, we warn parties that there is a heavy burden upon them in such event to show that it was done with sufficient specificity and distinctness, and we caution district courts to be slow in tolerating such procedure. In particular a party may expect to find that he has not preserved any matter where the request could be thought, on the charge as made, to have been given in substance. Even after the charge, it is normally insufficient simply to refer to the requests by number. . . . And, finally, *we warn counsel that even if the district court acquiesces in a procedure which is insufficient, a party may find that his rights have not been preserved.* . . ." (*Id.* at 684) (emphasis added).

The Ninth Circuit has also warned of the importance of stating objections to a jury charge *after* the court has instructed the jury. In *Kobey v. United States*, 208 F.2d 583 (9 Cir. 1953), the attorney for the defense stated, after the court had instructed the jury: "* * * and I assign as error the failure to give the instructions we have requested on the grounds stated." (*Id.* at 588). In stating that defense counsel had failed to meet his obligations under Rule 30, the court stated that the cryptic and sweeping phrase "on the grounds stated" may have referred to some "suggestions" made by counsel during a conference on instructions. "In our view",

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fanciful matter. In *Aday v. United States*, 388 U.S.447, this Court reversed a conviction based on a violation of the statute at issue in the case at bar—18 U.S.C. §1461. Petitioner Aday had been found guilty on 5 counts based on 5 different mailings of the same book. The trial court imposed a prison term of 5 years on each count, to be served consecutively and not concurrently, for a total of 25 years. The court also imposed fines totaling $89,000 therein. See, *United States v. West Coast News, Inc.*, 357 F.2d 855, 864 (6 Cir. 1966).

the court said, "such a procedure does not meet the requirement of Rule 30 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., to the effect that 'No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, *stating distinctly the matter to which he objects and the grounds of his objection.*' Reliance upon 'the grounds stated' if any grounds *were* stated—the day before is palpably inadequate." (*Id.* at 588) (emphasis in original).

Ziegler v. United States, 174 F.2d 439 (9 Cir. 1949), cert. denied 338 U.S.822, also cast a doubt on the procedure of using a pre-instruction conference as a substitute for proper objections after the court instructs the jury. In *Ziegler,* the trial court, before giving the instructions, informed counsel of its proposed action. At the pre-instruction conference, the court informed the parties that their exceptions were allowed, presumably referring to the instructions requested by appellant, which the court indicated it would not give. The Ninth Circuit stated that the trial court's allowance of the exception could not be regarded as an objection by appellant to any part of the charge, because, *inter alia,* "it was made before the charge was given. Until the charge was given, there could be no objection to any portion thereof or omission therefrom. . . . Appellant did not object to any portion of the charge or omission therefrom before the jury retired to consider its verdict. Hence we are not required to consider" the objections to the trial court's charge (174 F.2d at 448).

In light of the above, the court below was demonstrably in error when it concluded herein that:

> "Whatever reaction the jury might have had from seeing or hearing any part of the bench conference was the result of counsel's own doings and unnecessary for the preservation of appellants' record of objections. We conclude there was no prejudice to any of the defendants as a result of the procedural error on the part of the District Court to literally comply with Rule 30." (481 F.2d at 325).

VII.

Petitioners Were Denied a Fair Trial by an Impartial and Representative Jury, in Violation of the Guarantees of the Fifth and Sixth Amendments.

A. The Trial Court Abused Its Discretion and Denied Petitioners Due Process of Law When It Refused to Grant a Short Continuance Which Would Have Afforded Petitioners a Jury Panel Which Did Not Systematically and Absolutely Exclude All Persons Under 24 Years of Age.

The master jury wheel from which petitioners' jury was drawn necessarily excluded all persons under 24 years of age and virtually all persons under 25 years of age. The facts are undisputed. In 1968, the master jury wheel was filled with names of persons who were then registered voters. The venire from which petitioners' jury was selected in October 1971 was drawn from that wheel. As the court below recognized, "the youngest person drawn in 1968 would be in his 21st year of age and that the youngest person on the venire [from which petitioners' jury was drawn] would be in his 24th year. In fact, there were a few persons on the venire of that age." (481 F.2d at 313). Before trial,

petitioners moved to strike the venire on the ground that the jury plan systematically excluded all persons under 25 years of age [J.A. 65-67]. In connection with their motion to strike the venire, petitioners introduced evidence establishing that young persons were a cognizable group and that they were more tolerant than older persons in matters pertaining to the depiction of sexually explicit material [R.T. 85-86]. The trial court recognized that young persons were in fact excluded and that such young persons would be better jurors for petitioners, saying: "It may well be that the best possible of all worlds for the [petitioners] in this case would be to have jurors from age 18 to age 25. . . ." [R.T. 91]. The Clerk of the court was called as a witness and, after testifying to the fact that the master jury wheel was last filled in 1968 with the names of then registered voters, stated that within one month the master wheel would be refilled with the names of persons who then appeared on the voters registration list and that the master wheel would then contain the names of persons 21 years of age and over [R.T. 94-98]. The trial court denied petitioners' motion to strike the venire, but stated that the evidence presented indicated that "it is time to change the jury master wheel" [R.T. 93]. Thereupon, petitioners moved for a short continuance, of approximately one month, so that their jury would be drawn from a master wheel that included persons 21 years of age or over [R.T. 95-98]. This motion was denied [R.T. 98].

The court below assumed, without deciding, that the young do constitute a cognizable group or class (481 F.2d at 314). Nevertheless, that court, finding petitioners' argument that they had been branded as felons by a jury consisting of older persons "in rather poor taste"

(*id.*), concluded that petitioners "have failed to show, let alone establish, a purposeful systematical exclusion of the members of that class whose names, but for such systematic exclusion would otherwise be selected for the master jury wheel. . . ." (*Id.*) The court below relied on *Whitus v. Georgia*, 385 U.S.545; *United States v. Butera*, 420 F.2d 565 (1 Cir. 1970); *United States v. Parker*, 428 F.2d 488 (9 Cir. 1970); *Hernandez v. Texas*, 347 U.S.475; and *Torres v. United States*, 270 F.2d 252 (9 Cir. 1957), to justify the trial court's refusal to grant the requested continuance. With all respect, those cases fail to support the conclusion of the court below.

In *Whitus v. Georgia supra*, petitioner was convicted of murder in a state court. This Court reversed, holding that proof that the State employed the same procedures which concededly resulted in discrimination in petitioner's first trial constituted a *prima facie* case of purposeful discrimination in jury selection for his second trial. In *Hernandez v. Texas, supra*, the Court reversed a murder conviction holding that the evidence warranted a finding that persons of Mexican descent were a separate class, distinct from Whites, and that there had been a systematic exclusion of Mexicans from jury service. In *United States v. Butera, supra*, appellant was convicted of income tax evasion. On appeal, he contended that the grand jury which returned his indictment was improperly constituted because certain segments of the population were *inadequately* represented in the jury pool from which his grand jury was drawn. The First Circuit agreed that there was inadequate representation, but concluded that the Government's explanation for this was satisfactory. In the case at bar, we deal with a conviction

by a trial jury resulting in heavy prison terms and large fines, not with the mere return of an indictment. Moreover, in *Butera*, there was "inadequate representation", while in the case at bar there was a total absence of persons under 24 years of age. Finally, there simply was no satisfactory reason for the trial court's refusal to grant the short continuance requested, which continuance would have alleviated the biased jury wheel.

In *United States v. Parker, supra*, the attack on the jury venire was based solely on the fact that the wheel from which it was drawn was filled with names of registered voters. The Ninth Circuit concluded that the use of voter registration lists, as the sole source of the names of potential jurors, "is not constitutionally invalid, absent a showing of discrimination in compiling of such . . . lists" (428 F.2d at 489). While petitioners' complaint herein is not based on the fact that the jury wheel was filled exclusively by names drawn from the voter list, it should be noted that "it is desirable to seek feasible ways to supplement the voter list". *United States v. Dellinger*, 472 F.2d 340, 366 (7 Cir. 1972). Petitioners' complaint herein is that the trial court failed to grant a very short continuance which would at least have given petitioners the opportunity of having persons 21 years of age and over on their jury.

In *Torres v. United States, supra*, the Ninth Circuit held that the mere fact that the trial court refused to grant a further continuance after granting two continuances before trial started and two continuances thereafter, could not be said to have resulted in denying effective assistance of counsel. While it is true that a motion for a continuance is ordinarily addressed to the sound discretion of the trial court, the discretion is not

absolute. This Court has had occasion to observe that one way to attempt to assure that an accused is tried by a fair and impartial jury "is to grant a continuance of the trial". *Groppi v. Wisconsin*, 400 U.S.505, 510. The Court, quoting from *Irvin v. Dowd*, 366 U.S.717, 722, said: "In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial . . . jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. . . . In the ultimate analysis, only the jury can strip a man of his liberty or his life."

In *Sheppard v. Maxwell*, 384 U.S.333, 354, n.9, the Court said: "At the commencement of trial, defense counsel made motions for continuance and change of venue. . . . Without regard to whether the judge's actions in this respect reach dimensions that would justify issuance of the habeas writ, it should be noted that a short continuance would have alleviated any problem with regard to the judicial elections. The court in *Delaney v. United States*, 199 F.2d 107, 115 (C.A. 1st 1952), recognized such a duty under similar circumstances, holding that 'if assurance of a fair trial would necessitate that the trial of the case be postponed until after the election, then we think the law required no less than that.' "

It is the policy of the United States that all litigants in federal courts entitled to trial by jury shall have the right to petit juries selected at random from *a fair cross-section of the community*. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on petit juries. Title 28 United States Code §1861. This Court has uniformly held that our traditional concepts of justice require that a jury reflect a cross-section of the com-

munity. In *Thiel v. Southern Pac. Co.*, 328 U.S.217, 220, the Court said: "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. *Smith v. Texas*, 311 U.S.128, 130, . . . ; *Glasser v. United States*, 315 U.S.60, 85. . . ." See, *Williams v. Florida*, 399 U.S.78, 100; *Witherspoon v. Illinois*, 391 U.S.510, 520; *Ballard v. United States*, 329 U.S.187, 192-193. This Court has repeatedly used its supervisory power over the federal courts in articulating the requirement that a trial jury must reflect a cross-section of the community. See, *e.g.*, *Ballard v. United States*, 329 U.S.187; *Thiel v. Southern Pac. Co.*, 328 U.S.217, 220; *Glasser v. United States*, 315 U.S. 60, 62.

In *Miller*, 413 U.S.15, 30, the Court stated that our adversary system "with lay jurors as the usual ultimate factfinders in criminal prosecutions has historically permitted triers-of-fact to draw on the standards of their community. . . ." In *Paris*, 413 U.S.49, 56, n.6, the Court, in holding that the prosecution need not adduce evidence on the elements of obscenity, said: "No such assistance is needed by jurors in obscenity cases." The Court appears to have adopted the view first articulated by Judge Learned Hand in *United States v. Levine*, 83 F.2d 156, 157 (2 Cir. 1956), that an obscenity trial is really "a small bit of legislation ad hoc". In 1957 Judge Hand returned to the same theme. Speaking at the American Law Institute, Judge Hand said obscenity "cannot be defined", and he therefore objected to "an attempt to define the undefinable" (34 A.L.I. Proceedings, 191 [1957]). Judge Hand concluded that "we must not try to be definite. We

must leave it to the jury to say, is this obscene? Is it contrary to what you all think ought not to be? . . . The attempt to mix in with this an objective standard . . . seems to me to be absurd." (*Id.* at 192).

If we are to entrust to a jury the responsibility of separating constitutionally protected speech from criminal speech, it is essential, at a minimum, to have the most representative possible jurors sitting in the box. This is true not only because First Amendment rights are at stake but also because the crime of obscenity is so vague and emotionally charged. In *Miller*, Justice Douglas, dissenting, observed that what causes a person to be upset with a particular publication "may reflect only his neurosis not shared by others" (413 U.S. at 41). He also asserted that obscenity cases "generate tremendous emotional outbursts" (*Id.*). In *United States v. Vuitch*, 402 U.S.62, Justice Douglas stated that the subject of obscenity is an inflammatory one. "People instantly take sides and the public, from whom juries are drawn, makes up its mind one way or the other before the case is even argued." (402 U.S. at 80). In *Ginzburg v. United States*, 383 U.S. 463, 479, Justice Black, dissenting, asserted that the submission of an issue of the obscenity of material to a jury "amounts to practically nothing more than a request for the . . . juror to assert his own personal beliefs about whether the matter should be legally distributed". In *United States v. Roth*, 237 F.2d 796, 822 (2 Cir. 1956), Judge Frank observed that "[a] particular jury may voice the 'moral sentiments' of a generation ago, not of the present". In an obscenity case, he said, each jury constitutes "a tiny autonomous legislature". If then each jury in an obscenity case is to act as "a tiny autonomous legislature", then that "legis-

lature" must have fair representation because it not only decides what literature should be preserved and what literature should be consigned to the bonfire, but also decides whether a person distributing that literature is to be consigned to prison.

B. The Trial Court Abused Its Discretion and Denied Petitioners Due Process of Law When It Improperly Refused to Ask Prospective Jurors Questions on Voir Dire Designed to Expose Their Biases and Prejudices Concerning "Obscenity" and Sex.

The Government's own evidence establishes that a person's attitude towards sex and obscenity is determined more by his religious commitments than by any other single factor (*Report of the Commission on Obscenity and Pornography* 356). Nevertheless, the trial court refused to ask the jurors any questions concerning religion, although petitioners submitted such questions.[15] Additionally, the court refused to ask the jurors, although requested to do so by petitioners, whether they or any person close to them "made contributions to or associated in any way with the

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[15]Among the questions tendered by petitioners were the following:

"Do you believe that your present views concerning obscenity are influenced by your religious training or beliefs, educational background and experience, political affiliation, upbringing as a child and area or areas in which you lived?

"If the answer to the foregoing is in the affirmative, please explain.

"How frequently do you attend a place of worship?

"Do you consider yourself to be a deeply religious person?

"If the answer to the foregoing is in the affirmative, please tell us how you would classify yourself in this regard.

"Within the last 12-month period, have you heard any sermons at your place of worship dealing with the subject of obscenity or sexual conduct?

"If the answer to the foregoing is in the affirmative, please explain." [J.A. 78-81].

organization known as the Citizens for Decent Literature", or any similar organization; whether any juror had expressed himself in favor of or in opposition to legislation which makes it a crime to distribute allegedly obscene material to adults; whether any member of the jury had seen within the prior 18-month period a film, or read a book, which he believed to be erotically arousing or sexually provocative; whether any juror had a personal opinion as to whether any particular sexual theme should not be portrayed pictorially or in writing; whether a juror would refraim from viewing a film solely for the reason that it was condemned by the Catholic Newsletter; whether any juror believed that the mere fact that sexually explicit material may arouse sexual feelings in an adult is harmful; and whether any member of the jury knew anyone who had any experience with material which they considered to be desirable or undesirable [J.A. 78-81].

The court below recognized that the trial court had declined to ask "many questions", which the court characterized as "cumulative and argumentative" (481 F.2d at 314). The court had asked no question on the subjects referred to above and petitioners leave to this Court the question of whether the questions were "argumentative". Citing *United States v. Peterson,* 475 F.2d 806 (9 Cir. 1973), the court below said:

> ". . . The handling of those questions not asked was clearly within the range of the District Court's discretion in the matter and no clear abuse of the discretion nor prejudice to the [petitioners] has been shown. It is of interest to note that no claim of jury contamination through pretrial publicity, local prejudice, or general attitudes, is asserted

here. Accordingly, the [petitioners'] reliance upon Silverthorne v. United States, 400 F.2d 627 (9 Cir. 1968) and the race and religion cases is ill placed." (481 F.2d at 314).

The importance of affording an accused a probing voir dire examination in criminal cases has repeatedly been affirmed by this Court. In *Aldrich v. United States*, 283 U.S.308, a Black man's conviction of murder was reversed because his counsel was not permitted to make inquiry of the prospective jurors concerning their possible racial prejudices. Chief Justice Hughes stated that the right to examine jurors on the voir dire as to the existence of a disqualifying state of mind had been recognized in state courts with respect to Blacks and others "and in relation to religion and other prejudices of a serious character" (283 U.S. at 313). The Court rejected the argument advanced by the Government that it would be detrimental to the administration of the law to allow questions to jurors as to racial or religious prejudices. The reply of Chief Justice Hughes was:

> ". . . We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute." (283 U.S. at 315).

The opportunity afforded a defendant in a criminal trial to voir dire his jury is closely linked with the right of peremptory challenge, a right that has "very old cre-

dentials". *Swain v. Alabama*, 380 U.S.202, 212. In our country, peremptory challenges are freely used and relied upon "because juries here are drawn from a . . . cross-section of a heterogeneous society". Because of this, "*voir dire* in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories. . . ." (380 U.S. at 218-219). The use of the peremptory challenge "is a necessary part of trial by jury". It is "one of the most important of the rights secured to the accused." (380 U.S. at 219). The denial or impairment of the right is reversible error without a showing of prejudice. (*Id.*) The function of the challenge is not only to eliminate extremes of partiality, "but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." The availability of peremptories "allows counsel to ascertain the possibility of bias through probing questions on the *voir dire*. . . ." (*Id.* at 219). Only if an accused can ask probing questions on voir dire can the peremptory challenge perform its task of permitting the rejection of a juror for "real or imagined partiality" that cannot be demonstrated. A peremptory challenge is often exercised upon a juror's "habits and association". (*Id.* at 220). It is also often exercised "on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation, or affiliations" of the prospective jurors. "It is well known that these factors are widely explored during *voir dire*." (*Id.* at 221). The concept of a fair jury

trial has built into it the right of an accused to engage in such explorations. "[V]eniremen are not always judged solely as individuals. . . . Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried." (*Id.*) In short, the right of peremptory challenge, together with related right to voir dire the prospective jurors for hidden prejudices, serve a crucial function in our pluralistic society. In *Hamm v. South Carolina*, 409 U.S.524, the Court held that it was constitutional error to refuse to make appropriate inquiry of the jurors as to their racial bias after petitioner, a Black man, made timely request for such inquiry. See, *United States v. Dellinger*, 472 F.2d 340, 367-370 (7 Cir. 1972), *cert. denied* 410 (U.S. 970; *United States v. Blount*, 479 F.2d 650 (6 Cir. 1973); *United States v. Lewin*, 467 F.2d 1132, 1137-1138 (7 Cir. 1972).

Prejudice and bias in the area of obscenity, touching, as it does, matters of religion, upbringing and the like, are deep running streams frequently concealed by the bland faces of prospective jurors. In order to effectuate a fair trial by a fair jury, this Court has repeatedly held that an accused must be given a fair opportunity to question prospective jurors so that the accused would have some basis for a reasonably knowledgeable exercise of the peremptory challenge. Petitioners herein were denied that right and were thereby denied a trial by a fair, neutral and impartial jury, guaranteed by the Sixth Amendment.

VIII.

Petitioners' Fifth Amendment Rights to a Neutral and Unprejudiced Grand Jury Were Violated Because the Government Attorney Made Biased and Prejudiced Remarks to the Grand Jury Which Returned the Indictment.

The court below acknowledged by way of supposition that the Grand Jury may have been "biased or prejudiced" against petitioners "upon viewing the Brochure and Report" (481 F.2d at 313). The court found however that the record "is totaling lacking of any evidence or showing of any kind that any member of the Grand Jury was biased or prejudiced", except as they may have been so by their reaction to the said brochure. (*Id.*) The record does disclose, however, that the government attorney who appeared before the Grand Jury that returned the Indictment did all he could to inflame and prejudice the Grand Jury.

At the commencement of the trial, petitioners called to the stand Larry Butcher (hereinafter referred to as "Butcher"), attorney, department of justice, and the attorney who presented the case against petitioners to the Grand Jury [R.T. 13-14]. Butcher testified that he advised the Grand Jury that they were to be "guided solely by their instinctive feelings. . . ." [R.T. 19-20]; that they were to be guided by the standards of "moral judgment" which they had "assimilated through the totality of their experiences" [R.T. 20-21]; that they were "the sole judges of the contemporary community standards of this country"; and that the term "con-

temporary community standards" refers to the "average conscience of the time" [R.T. 33].

Although Butcher was not sworn as a witness [R.T. 29], he discussed with the Grand Jury the factual situation in *Ginzburg v. United States*, 383 U.S.463 (1966), placing particular emphasis on a publication involved in *Ginzburg* [R.T. 26-28]. He also discussed the extent of the sales of the book involved in the *Ginzburg* case, and the advertisement involved in that case [R.T. 28]; and "drew a parallel" between the *Ginzburg* case and the case at bar, emphasizing for the Grand Jury that petitioners herein mailed out 55,000 circulars [R.T. 28]. Butcher advised the Grand Jury "that we felt that the facts in this case were similar enough to those in the Ginzburg case to present [the matter to the Grand Jury] to see if they felt there was probable cause to believe that a Ginzburg-type situation was present in the case at bar]" [R.T. 28-29] (481 F.2d at 313).

Butcher's conduct tainted the Grand Jury proceedings with bias and prejudice rendering the Indictment infirm. See, *Costello v. United States*, 350 U.S.359, 364 (Burton, J., concurring); *United States v. Di Grazia*, 213 F.Supp.232 (E.D. Ill. 1963); *United States v. Whitted*, 325 F.Supp.520 (D.C. Neb. 1971). In *Di Grazia*, the government attorney asked the defendant prejudicial questions which could only be calculated to discredit and impugn her in the eyes of the Grand Jury. The court assumed there was other evidence which, in itself, would have warranted the indictment, but concluded that a dismissal was required because it would be "pure speculation as to whether that evidence or the prejudicial conduct of the prose-

cutor or both prompted the Grand Jury's action." (213 F.Supp. at 235). In words that have special meaning to the case at bar, the court said:

> "It is the duty of a prosecutor presenting a case to a grand jury not to inflame or otherwise improperly influence the jurors against any person. . . . These principles are so well grounded . . . as not to require elaboration. Their application here leaves me no alternative but to dismiss the indictment. . . ." (*Id.*)

In *United States v. Whitted, supra,* the court "concluded that it [was] impossible to determine whether the indictment . . . was returned on the basis of evidence or by the possible prejudice and bias of the jurors or both, and accordingly" dismissed the indictment (325 F.Supp. at 521).

Petitioners are mindful that on mandamus the Eighth Circuit held that Chief Judge Robinson was without jurisdiction to act at the time he dismissed the indictment. *United States v. Whitted,* 454 F.2d 642 (8 Cir. 1972). The basis for this ruling, however, was the finding by the appellate court that there were no "facts concerning the grand jury bias which were elicited at trial, but had been unknown to the trial judge at the time he [initially] overruled the motion to dismiss. . . ." (454 F.2d at 645).

In the case at bar, the prosecutor acted with gross impropriety before the Grand Jury, raising a high probability that the Indictment was returned as a result of bias or prejudice. Accordingly, the Indictment here should be dismissed.

Conclusion.

For the aforesaid reasons, and for the reasons set forth in the companion Brief filed on behalf of petitioners Kemp, Wright and Thomas, the judgments of conviction herein should be reversed.

Respectfully submitted,

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